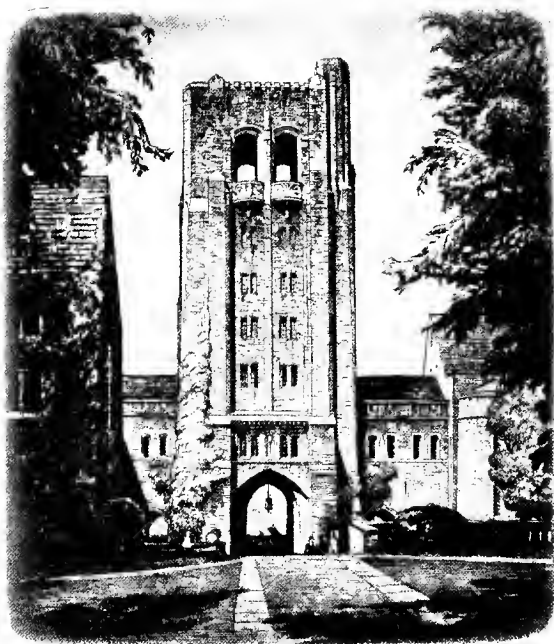




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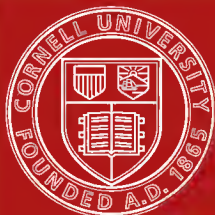
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STUDIES

IN

JURIDICAL LAW

BY
HORACE E. SMITH, LL. D.
DEAN
FOR A PERIOD OF TEN YEARS DEAN AND A DAILY LECTURER
OF THE ALBANY LAW SCHOOL

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PREFACE.

It is the design of the author to present his readers with a treatise which, so far as practicable under existing conditions of our juridical literature and requirements for admission to the bar, shall be acceptable and useful, both to the legal profession and to such general readers as may wish to acquire a knowledge of the cardinal principles of government and law as essential to a liberal education, and a valuable aid to the best qualifications for citizenship under a republican government. As the idea of the last-named use of law may be new to some of my readers whom it may concern, a brief historical sketch will tend to bring reader and writer to a mutual understanding.

Three hundred years before the Christian era there was an educational institution at Rome with thirty-one professors, two of whom were professors of law. Afterwards law schools were founded at Berytus, Constantinople, and several of less note in other places. At a later period in the eleventh century, a school was established at Bologna which was frequented by a multitude of pupils from all parts of Italy, France, and other countries. In all these institutions the Roman law was taught and studied as a preparation for professional life, and also as a branch of polite learning, constituting one of the accomplishments of a liberal education. Speaking of the Roman law thus taught and studied, Chancellor Kent says: "It was cradled and gradually matured on the banks of the Tiber by the successive wisdom of the

Roman statesmen, magistrates and sages, and governing the greatest people in the ancient world for the space of thirteen or fourteen centuries, and undergoing extraordinary vicissitudes, after the fall of the western empire, it was revised, admired, and studied in modern Europe on account of the variety and excellence of its general principles. It is now taught and obeyed, not only in France, Spain, Germany, Holland and Scotland, but in the islands of the Indian Ocean, and on the banks of the Mississippi and the St. Lawrence. So true, it seems, are the words of d'Aguesseau, that the grand destinies of Rome are not yet accomplished; she reigns throughout the world by her reason after having ceased to reign by her authority." At an early day the civil law was taught and studied in England as a part of a liberal education in the great Universities of Cambridge and Oxford; but the common law was not taught in these institutions until about the year 1758, when the Vinerian professorship was founded at Oxford, and Sir William Blackstone called to the chair of law. In his inaugural he strongly recommended the study of law as essential to a liberal education, and a preparation for the important duties incident to citizenship. For a time some heed was paid to his wise recommendation; but in the progress of events its observance was practically abandoned; but for no reason affecting the wisdom of Blackstone's recommendation. The change resulted in harm to this country after its separation from the mother country. At the date of our independence it had so far ceased to be recognized and observed as an element of English polity, that our forefathers did not bring it with them as an inheritance. Its observance in England, it should be noticed, was of small importance compared with its estimated value to this country. There, government and law, together with

all public affairs, are mainly in the hands of the nobility, an educated class, who have more or less knowledge of the general principles of government and law; conservatism, and old ideas and customs, largely dominate society; and revolutions are rare and of slow growth. Widely different conditions exist in the United States where law is the element of national life; and where commerce, productive industries, the arts and sciences, are constantly surprising the world with new discoveries, inventions and achievements; where, as a result, new questions frequently arise for legislative action and judicial construction, the proper solution of which demands a thorough knowledge of the principles of government and law. To make the spade of a ditcher, or a woodman's ax, an educational training is requisite; while in the Nation and most of the States, the delicate duty of making laws for the regulation of public affairs, and the rights and obligations of individuals, is left to men guiltless of any knowledge of the science of law. True, educated men find their way into the halls of legislation, and sometimes these acquire a powerful influence; but if a thorough knowledge of the general principles of government and law were possessed by all the members, the power of the whole body for good would be greatly augmented. It would be difficult, if not impossible, to overstate the value of a thorough knowledge of the cardinal principles of government and law to all who are influential in shaping legislation and molding society. Law is the atmosphere in which we live and move and have our social being. It surrounds us from the cradle to the grave, dominates every interest of society, guards life, liberty, property, and reputation, protects our firesides and our altars, and finally shields the tombs of our loved ones from desecration. Little argument should be

needed to show the great value of the knowledge of government and law in this country where official positions, legislative, administrative, executive, and even judicial, are sometimes filled by men conspicuously incompetent.

The question of making a knowledge of the cardinal principles of juridical law requisite to a liberal education, and important for all official and influential citizens, has received unusual attention of late, and the affirmative is growing in public favor. For example, it was assigned by the Regents of the University of the State of New York, for discussion at their annual convocation in July, 1887. On that occasion several papers were read strongly advocating the affirmative, which were favorably received. Now, assuming that an advance will be attempted on the line above indicated, how shall our educated men acquire the requisite legal knowledge? It cannot be expected that they will take a course of legal study in a lawyer's office or a law school; and, therefore, law books will be their only resource. Little time and research, however, will show that the supply of works suitable for their purpose is very limited. Most of the law books issued by the publishers for many years past treat, mainly, each of a single branch or subject of the great body of the law, and may conveniently be termed subject-books. While the works needed for this class of readers are few, a flood of subject-books is annually poured out upon the country. These, it is assumed, discuss the underlying principles of each particular branch, which is true only to a limited extent. All are necessarily occupied, to a greater or less extent, with minor details and illustrations which are of little use to the general reader; and some are so largely filled with technicalities, hair-breadth distinctions, and conflicting decisions, as to render them of very little use to anybody. What the gen-

eral reader needs is a clear presentation of the cardinal principles of the law, relieved of all unnecessary and confusing matter. For the padded class of subject-books he has neither time nor relish; and the better class is too limited in number for his purpose. It is not intended by the writer to criticise unfavorably all subject-books; some of them are models for excellence of structure and style. But the field of law is so broad, that to obtain a thorough knowledge of its principles in all branches from subject-books would require more time than general readers have at command for the purpose. Commentaries, embracing the whole field of juridical law, are rare products of late. The great work of that peerless writer, Sir William Blackstone, and others of less note, are accessible; but these present some of the obstacles to general readers found in subject-books. Blackstone is read by only a few outside of the legal profession, and these are attracted by the beauty and purity of his style and the perfection of his logic. And some lawyers, even, place in the hands of their students inferior works to the exclusion of Blackstone in order to gratify the quest of the young men for an easy and speedy course to the goal of their ambition — admission to the bar, rather than a thorough preparation for the duties of the profession. It may be, however, that to the changes of the law since Blackstone's time, by legislative and judicial action, is due, in part, the neglect of his grand work.

The writer is by no means unmindful of the difficulties that would be encountered in an attempt fully to realize the ideal; and an attempt to make an immediate radical change would not be wise, even were it practicable. But he thinks that some advance steps may be taken in the right direction. If the over-padded work could be ban-

ished from the field, and some modification of the better class of subject works be effected, the task would be comparatively easy. But a wide departure from the beaten path should not be attempted at once. Much more might be said of existing conditions and needs, but brief attention must be given to the other class of readers, practitioners and students of law.

The existing conditions above described have an immediate injurious effect upon the student, and an ultimate unfortunate influence upon the profession by lowering its tone. Students quite generally, if not indeed universally, are impatient of delay in admission to the bar, and strenuous in their efforts to make the legal term of clerkship conveniently brief. In this they have the aid of their friends, and that class of citizens who entertain strong prejudices against the lawyers, and hold that the courts should be open to all who may wish to pettifog. The result is, that with the short clerkship, and numerous branches of the law, students are compelled to pass over all in a superficial manner, or omit some altogether,—dreamily promising themselves to supply the deficiency when safely within the bar. Some take one alternative, and some the other; but neither is wise nor safe. Some religiously keep their self-made promise, and rise to eminent positions in the profession; while many forget, or indolently neglect its fulfillment, and are doomed to a low rank from which they never rise. They resemble the bumblebee, which it is said is largest and most showy and noisy when first born. From considerable experience at the bar, with students in the office and law school, and several years' service as court examiner of applicants for admission to the bar, the writer is able to speak understandingly upon this subject. And before passing he is

moved to assure students that, as compared with a smattering of the minor rules and technicalities abounding in some of our subject-books, a thorough knowledge of underlying principles is vastly the more important for them. The strong and successful lawyer stakes his case in court upon the cardinal principles involved, using lighter ammunition sparingly. Some modifications of even the better class of subject-books, and requirements for admission to the bar, may be expected, but changes may come slowly, and indeed should be made only in obedience to popular demand, or the imperative requirements of existing conditions.

In the studies which this preface introduces to the public may be found a practical embodiment to a limited extent of the writer's views of what is needed. Subjects or branches of the great body of our law are selected for treatment and are discussed in the order following: 1. The term Juridical Law is defined. 2. The main features of these subjects are presented, omitting all unnecessary and confusing matter. Most of the subjects thus treated are those which students often omit or pass lightly over in their preparation for their important professional duties; other subjects are selected in view of their great importance and wide application in the social and business world. No lawyer can rightfully claim a respectable standing in the profession while ignorant of the cardinal principles of these neglected subjects. 3. Several topical discussions which are deemed of sufficient interest and importance to justify special treatment are added. 4. Supplementing all are two papers read before the Albany Institute and published in the proceedings of that body; one upon the Plea of Insanity, suggested by the trial of Guiteau for the assassination of President Garfield, and

the other upon Literary Property. These subjects, and especially the first named, cannot be too thoroughly ventilated. Some passages of the latter paper had already appeared in the discussion of the subject of insanity, but, under the circumstances, it is not thought that an apology is required for the repetition.

To the candid consideration of the readers for whom they are designed, the following studies are submitted, with the hope that they may prove acceptable and useful.

HORACE E. SMITH.

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STUDIES IN JURIDICAL LAW.

CHAPTER I.

THE TERM "JURIDICAL LAW" DEFINED AND EXPLAINED.

SECTION 1. Use of the term.

2. Office and value of definitions.
3. Difficulty of framing accurate definitions.
4. Blackstone's definition of juridical law.
5. Chitty's criticism.
6. Chitty's criticism examined.
7. Comment by Judge Cooley.
8. Chitty followed.
9. Its alleged inapplicability to popular governments.
10. Custom invoked by Blackstone's critics.
11. International law.
12. A rule.
13. Use of the terms "rule" and "principle."
14. Ethics involved in principle.
15. Other definitions of law.

§ 1. Use of the term.—The qualifying term "juridical" in the title of this chapter is used to limit the term "law" and its definition, and exclude all kinds of law which do not directly apply to human governments. The term "law" has various applications, with a significance peculiar and appropriate to each. In other words, there are various kinds of law; as, for example, natural, physical, moral, and psychological; and it is impossible to frame a definition that will properly characterize each and all.

Says Montesquien: "Laws are the necessary relations which arise from the nature of things; and, in this sense, all things have their laws, the natural universe has its laws, intelligences superior to man have their laws, man has his laws. In this sense, the idea of a command, proceeding from a superior to an inferior, is not involved in the term "law." It is frequently thus used to denote simply a statement of a constant relation of phenomena. The laws of science thus are but generalized statements of observed facts."¹

§ 2. **Office and value of definitions.**—A definition is a text, of which the subject for discussion is an expansion, an exposition and an application. "In the law," says Mr. Bishop, "a definition is a legal doctrine epitomized; . . . the test of its value is whether or not it actually pictures, in miniature, not what the courts say, but what they have adjudged."² A good definition gives, *in limine*, a correct and comprehensive view of the subject embraced in the discussion following; a true conception of the doctrine involved; thus enabling the student to see the relation of the parts to the whole as he advances in its study, with less danger than he would otherwise encounter of forming a disjointed and imperfect view of the subject. In a treatise on law, especially, the true office of a definition is to present the doctrine involved in the discussion to which it is an introduction, in a clear, condensed and comprehensive view, relieved of confusing details, exceptions, nice distinctions and conflicting adjudications often encountered in a full treatment of the subject.

§ 3. **Difficulty of framing accurate definitions.**—It is not, however, in all cases easy to formulate a defini-

¹ *Esprit de Loi*, b. I, ch. 1.

² Bishop, *Mar. and Div.* (6th ed.), § 4.

tion, at once accurate, concise and comprehensive. By reason of the variety of juridical laws adapted to different conditions and circumstances, and the complex character of some branches of law, the formulation of a good definition is rendered quite difficult in some cases. Most definitions require in use a liberal accommodation of language.

Judge Dillon justly says: “The most accurate notions of complex subjects come not from definition, but description.”¹ The best result attainable is a concise, clear and comprehensive definition, sufficiently accurate for all practical purposes, and not misleading.

§ 4. Blackstone’s definition of juridical law.—Numerous law writers have essayed the formulation of such a definition as above described; but none more successfully, it is confidently affirmed, than that peerless jurist, Sir William Blackstone. His definition follows: “*A rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.*”² The use of the phrase “civil conduct” points unerringly to juridical law as the subject of its application; and thus applied it is clear in statement, comprehensive in scope, and substantially accurate.

True, the terms “commanding” and “prohibiting” are suggestive of a personal sovereign, and of a despotic or monarchic government; but the phrase “prescribed by the supreme power in a state” indicates a wider application of the definition; and, without doing violence to the language, these terms may be applied to popular governments, as will be shown in the subsequent discussion of the definition in question.

¹ 1 Dillon, *Mun. Corporations* (2d ed.), § 9a.

² 1 Bl. Com., p. 44.

Blackstone wrote in 1753, nearly one hundred and fifty years ago, and naturally employed language more especially suited to the principal governments then existing; but his clear conception of the origin, nature and office of law guided him in the use of terms appropriate to any form of government. Yet this definition has been subjected to adverse criticism by several subsequent law writers. But, while it is easy to criticise, it may well be questioned whether a better definition than Blackstone's can be found or formulated.

A brief examination of the more prominent criticisms referred to may serve a useful purpose, by presenting some important considerations apparently overlooked by Blackstone's critics, even if it do not vindicate the correctness of his definition.

§ 5. **Chitty's criticism.**—Mr. Chitty says of the definition, "A municipal law is completely expressed by the first branch of the definition: 'a rule of civil conduct prescribed by the supreme power in a state.' And the latter branch, 'commanding what is right, and prohibiting what is wrong,' must either be superfluous, or convey a defective idea of a municipal law; for if right or wrong are referred to municipal law itself, then whatever it commands is right, and whatever it forbids is wrong, and the clause would be insignificant tautology. But if right and wrong are to be referred to the law of nature, then the definition will become deficient or erroneous; for though municipal law may seldom or never command what is wrong, yet in thousand instances it forbids what is right; it forbids any unqualified person to kill a hare or partridge; it forbids a man to exercise a trade without seven years as an apprentice; it forbids a man to keep a horse or a servant without paying the

tax. Now all these acts were perfectly right before the prohibition of the municipal law."¹

§ 6. Chitty's criticism examined.—Mr. Chitty justly held a high rank as a learned jurist, yet the justice of his criticism in question cannot be accepted without challenge.

1. The truth of the statement that municipal law is completely expressed by the first branch of Blackstone's definition, "a rule of civil conduct prescribed by the supreme power in a state," is at least questionable. This statement either assumes that the first branch of the definition embraces all that follows, which, therefore, is superfluous, or that in the concept of a rule of civil conduct the constituents of right and wrong are excluded. Neither alternative will justify the criticism in question. No intelligent person will for a moment insist upon the truth of the latter alternative.

If it be conceded that the first branch of the definition in question does, theoretically, embrace command of right and prohibition of wrong, still it must be acknowledged that the supreme power in a state does not always, in its legislation, enjoin the right and condemn the wrong. That human enactments do sometimes sanction wrong is well known, and is a humiliating illustration of depraved humanity. The Bible speaks of "framing iniquity by law."² As an example of unjust human law may be mentioned the slave-code of the United States, now happily "blotted out forever." Whatever may have been thought of the human-chattel system in past generations, it is now generally regarded by all Christian nations as a flagrant destruction of God-given rights. Many ex-

¹ 1 Chitty's Blackstone, 44, 45, n.

² Psalms, 94: 20.

amples of wicked laws might be cited from the records of the past.

If it be the true office of law, as a rule of civil conduct, to enjoin right and prohibit wrong, no good reason can be assigned for omitting the expression of this office from a formulated definition. Indeed, without such expression a definition of law would be incomplete.

It may be said in defense of Mr. Chitty's criticism that the power of the courts to declare void, enactments which are subversive of fundamental rights and justice, renders the second branch of Blackstone's definition superfluous, as such enactments are not law in the true acceptance of the term. But the fact that a law in *form* is not necessarily a law in *essence*, is no reason why the definition of law should omit an element essential to its validity.

Besides, while courts are clothed with power to judicially declare statutes void, judges are disinclined to set their opinions against the legislative judgment, on questions of ethics involved, and so it sometimes comes to pass that judicial modesty permits injustice to wear the livery of law.¹

2. Wholly unwarranted is this clause of Mr. Chitty's criticism: "If right or wrong are referred to municipal law itself, then whatever it commands is right, and whatever it forbids is wrong, and the clause would be insignificant tautology." In Blackstone's definition right and wrong are not referred to municipal law itself. The character of the act commanded or forbidden does not depend upon the law, but the law is suited to the character of

¹ Bishop, *Written Laws*, § 40; *Day v. Savage*, Hob. 85, 87; *Bonham's Case*, 8 Co. 118a; *Cromwell's Case*, 4 Co. 12a, 13a; *London v. Wood*, 12 Mod. 669, 687, 688; *Baltimore v. The State*, 15 Md. 376, 469; *Ham v. McClaws*, 1 Bay, 93; *Bowman v. Middleton*, 1 Bay, 252; *Morrison v. Barksdale*, Harper, 101.

the act. The thing commanded or prohibited exists prior to the enactment, or rule of law, applied to it. This is plain enough in respect to things right or wrong in themselves, *mala in se*; but there may be room for a doubt or quibble respecting things morally colorless in themselves, in contemplation of the Divine law,—things which, when prohibited by municipal law, fall into the general division of wrongs *mala prohibita*. But, theoretically and in the true conception of law, it never commands what is wrong or forbids what is right. It may do so, it is true, and sometimes sanction wrong, as we have seen; but this is a perversion of its legitimate office due to imperfect humanity.

The class of wrongs *mala prohibita* may, in a sense, be created by prohibitory law, as intimated by Mr. Chitty in the criticism in question, inasmuch as the punitive desert of actions thereto belonging depends upon the law itself. Yet these prohibitions are based upon the assumption that the prohibited actions are injurious to society, or to some of its members, and therefore wrong; hence, the second function of law named in Blackstone's definition, “prohibiting what is wrong,” is strictly correct. The ethical character of the act prohibited, abstractly considered, whether belonging to the class of wrongs *mala in se* or *mala prohibita*, is not affected by the law. The thing, abstractly viewed, may be right in one relation and wrong in another; right in relation to the Divine law, because no infraction thereof, but wrong in the sphere of human law, because injurious to society.

Human governments and laws deal with men solely as members of society; they do not touch or aim to touch directly the relations of their subjects to the Divine law, or to the government of God; these are beyond the juris-

diction of human governments and laws, and of earthly tribunals.

True, human laws often forbid and punish acts which violate Divine law; not, however, because of their repugnance to the laws of God, but by reason of their injury to society. And for the same reason human laws prohibit and punish acts, not in themselves, abstractly considered, infractions of Divine law.

That giant in the realm of thought, President Mark Hopkins, in a sermon delivered before the legislature of Massachusetts, said: "I observe, then, first, that human governments regard man solely as the member of a community; whereas it is chiefly as an individual that the government of God regards him."¹

It is not meant to be affirmed that human laws are complete without the moral element, but only that in these laws the questions of right and wrong are determined primarily by their relations to human society, and not by their relations, abstractly, to the Divine law.

Nor should it be assumed that infractions of human law may not be in conflict with the spirit of the Divine law, even when not direct breaches of its specific commands and prohibitions. The precept of love to one's neighbor impliedly forbids acts injurious to his rights and interests; and while these acts, in themselves abstractly considered, may not violate specific provisions of the Divine law, they may rightly be forbidden by human law; and this without exposure to Mr. Chitty's condemnatory alternative of prohibiting what is right.

So, also, the duty of obedience to righteous human laws is enjoined by God, and disobedience is manifestly a breach of this duty; and in this case, and others of like

¹ Miscellaneous Essays and Discourses by President Hopkins, ed. of 1847, p. 335.

character, men hold relations to both Divine and human law; and God will indicate his own law in his own time and way.

This does not conflict with what has been said above in regard to the spheres, respectively, of Divine and human government and law.

3. As already shown, the statement that municipal law “in a thousand instances forbids what is right” is not unqualifiedly true; that while true in respect to the Divine Code, it is not true in the sphere of human law, embracing only social relations.

§ 7. **Comment by Judge Cooley.**—No judgment upon the criticism in question could be adduced superior in authority to that of the eminent American jurist, Prof. Cooley of Michigan University. Referring to Blackstone’s definition of law, and Chitty’s criticism, he says: “This definition has been often criticised. It has been said that so far as it is accurate it is complete in its first branch, ‘a rule of civil conduct prescribed by a supreme power in a state,’ and while municipal law may never command what is wrong, it often prohibits what is right; as, for example, the killing of game by an unqualified person. But these things which the supreme authority forbids, however innocent in themselves, abstractly considered, must be understood as inhibited, because in view of the relation of the citizen to the state, or to some one or more of his fellow-citizens, it is not proper, right or best that they should be done. The laws which forbade unqualified persons to destroy game were based upon an assumed superior right in the privileged classes; and the regulation of trades has its foundation in the legislative judgment of what is best and most expedient for society at large. Viewed relatively, therefore, the acts forbid-

den are not perfectly right, but in some of their relations, incidents or consequences would work a wrong which, assuming the premises to be correct, the legislative authority may properly prevent."¹

§ 8. **Chitty followed.**—Several law writers, following Mr. Chitty, have either expressly or impliedly adopted his plausible and confident criticism. Among others less distinguished may be mentioned Chancellor Kent, who adopts the first branch of Blackstone's definition, "a rule of civil conduct prescribed by the supreme power in a state;" and omits without discussion the second branch, "commanding what is right and prohibiting what is wrong."²

It may be suggested, without discredit to the ability of these followers of Chitty, that possibly they adopted his views on the strength of his reputation as a learned jurist, and without careful consideration.

§ 9. **Its alleged inapplicability to popular governments.**—The definition in question is thought by some writers to be inappropriate to popular governments, in which it is said that law is an emanation from the people, and not a rule prescribed by a sovereign for the civil conduct of the people. And in support of this contention its advocates adduce the government of the United States.

It is true that in this government the people are the original and ultimate source of authority; but it is also true that, for the purpose of the definition and analysis under consideration, the *origin* of the government is wholly immaterial. It is *the government*, of whatever form, or however established, that constitutes the supreme

¹ Cooley's Blackstone (3d ed.), p. 44, n.

² 1 Kent's Com., p. 446.

power in a state, and the people are its subjects. The people of the United States framed and ordained the federal constitution as the supreme organic law of the republic; and the people of the several states, in the exercise of their reserved powers, established the state constitutions. Under and by virtue of these organic laws, through the instrumentality of the national congress and the state legislatures, each in its own sphere, with its granted or reserved powers, and subject to its prescribed limitations, the statutory laws are made which are binding upon the people as subjects of the government thus established.

For the purpose of a definition of law, it is no valid objection to this view that the supreme power established by the people is impersonal; the phrase “supreme power” in Blackstone’s definition does not necessarily limit its application to personal sovereignty. And in this, as in every word and clause of the definition, is revealed the wisdom and rhetorical skill of its author, in mastering the difficulty involved of employing language at once sufficiently explicit, condensed and comprehensive.

The government in a republic, so far as the definition in question is involved, is unique; while an intangible, invisible entity, a public corporation created by the people, yet it is the “supreme power,” sovereign its sphere, and its creators are its subjects.

§ 10. Custom invoked by Blackstone’s critics.—As further proof that law does not proceed from the sovereign to the people, but from the people to the sovereign, custom is cited by some of Blackstone’s critics.

The substitution of the term “sovereign” by the critics, for the phrase “supreme power in a state,” employed by Blackstone in his definition, may possibly be mislead-

ing. The two expressions have been used interchangeably in the discussion with like meaning; but the term "sovereign" is more suggestive of personality than "supreme power," which may stand for a personal sovereign, or the supreme impersonal authority in an organized government.

With this explanatory caution against mistaking the import of language employed, custom, in its bearing on the question under discussion, may now be considered.

It is true that a particular and general usage of the people, of long standing, may, and sometimes does, ripen into custom and become law. But the last step in this evolutionary process is not due to any inherent force or virtue in the custom itself, but rather to the will of the supreme power expressed and sanctioned by legislative act or judicial decree. Custom is thus coined into law; and thus made embraces all the essential characteristics of other juridical laws, and is correctly defined by the same formula.

The truth of this statement is shown by the well established rule, that "evidence of usage is never admissible to oppose or alter a general principle or rule of law, so as, upon a given statement of facts, to make the legal rights of the parties other than what they are by law."¹ The truth of this view is confirmed by the fact that "customs, though established by consent, must be (when established) *compulsory*; and not left to the option of every man whether he will use them or not;"² for it is obvious that the ability to enforce law exists alone in the supreme power of the state.

Says Judge Cooley: "The most serious question per-

¹ Bouvier's Law Dic., title "Custom," § 5; 1 Cooley's Bl. (3d ed.), pp. 77, 78, text and notes.

² 1 Cooley's Bl. (3d ed.), p. 77.

taining to usages is, whether they are admissible in any case when they oppose or alter a general principle or rule of law, and upon a fixed state of facts would make the legal rights or liabilities of the parties other than they are by the common law. We think we are justified by the authorities in answering this question in the negative.”¹ The formidable array of authorities cited by him abundantly justifies his answer.

That eminent jurist, Chief Justice Gibson, of Pennsylvania, says judicially: “Nothing should be more pertinaciously resisted than those attempts to transfer the functions of the judge to the witness stand by evidence of customs in derogation of the general law, that would involve the responsibilities of the parties in rules whose existence, perhaps, they had no reason to suspect before they came to be applied to their rights.”²

§ 11. International law.—It has been suggested that the definition under discussion does not apply to the law of nations, because that law is not prescribed by a sovereign or supreme power in a state.³

A code of international law, while differing in some respects from municipal law, in the ordinary acceptation and application of the latter term, may, nevertheless, be properly assigned to the relation of sovereign and subject, using the term “sovereign” in an impersonal sense. The subjects, it is true, are *nations* instead of *persons*; but the code or body of rules established for the government of nations in their dealings with, and relations to, each other, constitutes the “supreme power” in the family of nations. This code applies to and binds, not only the subject

¹ 1 Cooley’s Bl. (3d ed.), p. 78, n.

² Boulton v. Colder, 1 Watts, 360.

³ Wharton’s Com. on Am. Law, §§ 26, 113.

nations in their corporate capacity, but also the subjects individually, of each constituent government. It matters not how the international code is established, whether by agreement, by custom ripened into law, or otherwise; when established it becomes the supreme power in its sphere, and to its rules all civilized nations owe obedience.

Treating of international law, Chancellor Kent writes: "By this law we are to understand that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other." "There has been a difference of opinion among writers concerning the foundation of the law of nations. It has been considered by some as a mere system of positive institutions, founded upon consent and usage; while others have insisted that it is essentially the same as the law of nature, applicable to the conduct of nations, in the character of moral persons, susceptible of obligations and laws. We are not to adopt either of these theories as exclusively true. The most useful and practical part of the law of nations is, no doubt, instituted or positive law, founded on usage, consent and agreement."¹

It has also been said that the essential of sanction is lacking in the law of nations. This is a mistake. Although there be no established tribunal to which all controversies between nations may be referred for adjudication, clothed with power to enforce its decrees, sanctioning power is not wanting. In all the constituent nations where this code is recognized as part of the law of the land, and hence binding upon the government and its subjects, it is obvious that its enforcement rests upon the same basis and authority as that of the municipal law, touching all persons and matters within the territorial jurisdiction of the courts. "In arbitrary states," says Black-

¹ 1 Kent's Com., pp. 1, 2.

stone, "this law, wherever it contradicts, or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world."¹

International law is, also, a part of the law of the United States. The federal constitution confers upon congress the power "to define and punish . . . offences against the law of nations;"² and congress has exercised this power. The laws passed in pursuance of this constitutional authority are cognizable by the federal courts, and enforced like other national laws.

Where a nation, in its corporate capacity, violates this code there is the *dernier* resort to "grim visaged war." "No nation," says Chancellor Kent, "can violate public law without being subjected to the penal consequences of reproach and disgrace, and without the hazard of punishment to be inflicted in open and solemn war by the injured party."³ And Blackstone writes that "offenses against this law are principally incident to whole states or nations, in which recourse can only be had to war, which is an appeal to the God of hosts to punish such in-

¹ 1 Bl. Com., Book IV, p. 67.

² Federal Constitution, art. I, § 8.

³ 1 Kent's Com., pp. 180, 181.

fractions of public faith as are committed by one independent people against another, neither state having any superior jurisdiction to resort to on earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government under which they live to animadvert upon them with becoming severity, that the peace of the world may be maintained."

Thus it will be seen that the code of international law is the dominant authority in the family of nations, its subjects, with ample¹ means of enforcement.

§ 12. A rule.—Blackstone explains the term "*rule*" as used by him in the definition under discussion, thus: 1. "It is a *rule*, not a transient, sudden order to or concerning a particular person, but something permanent, uniform and general. 2. It is also called a rule to distinguish it from advice or counsel, which we are at liberty to follow or not, as we see proper, and to judge of the reasonableness or unreasonableness of the thing advised; whereas our obedience to the *law* depends not upon *our approbation*, but *the maker's will*. Counsel is only matter of persuasion; law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also. 3. It is also called a *rule* to distinguish it from a *compact or agreement*, for a compact is a promise proceeding *from* us; law is a command directed *to* us. The language of a compact is, 'I will, or I will not, do this;' that of a law is, 'thou shalt, or shalt not, do it.' It is true there is an obligation which a compact carries with it equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done before we are obliged to do it; in

¹ 1 Bl. Com., Book IV, p. 68.

laws, we are obliged to act without ourselves determining or promising anything at all. Upon these accounts law is defined to be a '*rule*.'"¹

Professor Cooley, in a note upon this passage in Blackstone, says: "A law may nevertheless be a compact or agreement also, of which we have many illustrations in American law. The most common of these is a corporate charter in which the state assures certain rights to the corporators in consideration of the benefit which the performance of the corporate duties will bring to the state. The charter is not a contract in form, but in its essentials it is, and must be so considered."²

§ 13. Use of the terms "rule" and "principle."—The terms "rule" and "principle" are frequently used interchangeably in legal literature, as identical in significance. But in strictness and accuracy of definition the term "principle" has a broader significance than that of "rule," unless it be when the latter term takes the place more appropriate to the former.

While "rule" may, from long usage, be properly substituted for "principle" in many cases, without confusing ideas or clouding the sense, there are cases in which "principle" cannot properly be substituted for "rule."

"Principle" has been well defined to be "a fundamental doctrine; an elementary proposition;"³ "a rule or axiom which is founded in the nature of the subject, and it exists before it is expressed in the form of a rule."⁴

A principle, therefore, in its comprehensiveness and flexibility, may embody many rules, applicable to divers

¹ 1 Bl. Com., p. 45.

² 1 Cooley's Bl., p. 44, n., citing *Dartmouth College v. Woodward*, 4 Wheat. 518, and *The Binghamton Bridge*, 3 Wall. 51.

³ And. Law Dic., title "Principle."

⁴ Bouv. Law Dic., title "Principle."

relations and conditions of society, and to the frequent changes occurring in the various subjects of judicial cognizance.

The term "rule" is applied arbitrarily to methods of procedure in judicial tribunals, called "rules of court," or "rules of practice." Express statutory power is generally conferred upon courts of record to establish rules for their procedure; but it is held "at the same time that these courts have an inherent right to make rules to regulate their practice and to expedite the determination of suits and other proceedings, the rules being consistent with the constitution and laws of the state. Otherwise the public business could not be dispatched."¹ In such cases, and those of like character, it would be manifestly improper to substitute "principle" for "rule."

A rule of practice for the administration of justice may be wise or unwise, expedient or inexpedient, but it contains no ethical quality. On the contrary, the term "principle," applied to law, implies the embodiment of a moral element.

§ 14. Ethics involved in principle.—It should be observed, in passing, that the term "principle," in juridical lore, when applied to human conduct, generally, if not indeed universally, involves the moral element. Of this truth brief notice has already been taken,² but its importance invites some further consideration in this connection.

That all the relations and conditions of social life are subject to the claims of morality there can be no doubt;

¹ *Vannatta v. Anderson*, 3 Binn. 423; *Barry v. Randolph*, id. 277; *Fullerton v. Bank of United States*, 1 Pet. 613; *Jones v. Rittenhouse*, 87 Ind. 350.

² *Ante*, §§ 6 and 11.

and principles of law point the application of moral obligation to specific cases and classes of relation. It follows, therefore, that all law relating to civil conduct and relations should be in harmony with the laws of nature and revelation.

This truth is clearly and forcibly expressed by Blackstone. Referring to the law of nature he says: "This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."¹ Referring to revelation in the same connection he adds: "Yet, undoubtedly, the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law; because one is the law of nature, expressly declared to be so by God himself; the other only what, by the assistance of human reason, we imagine to be that law." "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."²

The same truth is otherwise thus tersely expressed: "The municipal laws of nations and communities are, in their origin and intrinsic force, no other than the rules of being, given to man by God."³

Were it necessary, much more authority might be adduced to the same effect. The foregoing brief presentation of the ethical quality of law is, the writer believes,

¹ 1 Bl. Com., p. 41.

² 1 Bl. Com., p. 41.

³ Potter's Dwarrris on Statutes and Constitutions, p. 36.

in harmony with the views of the most learned jurists and moralists.

Reason teaches, and experience shows, that honest and law-abiding men may differ respecting the binding force of a human enactment, which is not manifestly to all intelligent persons in conflict with the "higher law." In such case, a man who regards the law as subversive of right and justice must decide for himself whether to obey it or risk the consequences of disobedience. A law enacted by the legislature of a sovereign state, and adjudged valid by its highest judicial tribunal, must be held obligatory upon all the subjects of that jurisdiction. If a subject cannot conscientiously obey the law, he will be compelled to weigh the claims of conscience against the penalty of disobedience. History furnishes many noble examples of martyrs for conscience sake in such cases.

§ 15. Other definitions of law.—Several authors, including Chancellor Kent, as we have seen, have adopted without discussion the first branch of Blackstone's definition, "a rule of civil conduct prescribed by the supreme power in a state," omitting the last branch, "commanding what is right and prohibiting what is wrong."¹

Law is also defined, "a command addressed by the sovereign of the state to his subjects, imposing duties, and enforced by punishments."²

A very brief but comprehensive definition is that of the late Chief Justice Waite, of the United States supreme court: "Laws are made for the government of actions."³ This, however, is rather a statement of the object of law than a definition.

¹ Kent, Com., p. 446.

² Stephen, Hist. Crim. Law Eng. 76; Austin.

³ Reynolds v. United States, 98 U. S. 166.

Prof. Pomeroy defines municipal law thus: "The body of rules by which the supreme power in a state is guided in its governing action."¹

With due respect for the distinguished authors quoted, and others who have adopted Mr. Chitty's criticism, in whole or in part, without question, the writer must express his firm conviction that no definition of juridical law has been formulated more complete and accurate than that of Blackstone; and that other definitions might be improved by a recognition of the ethical element.

¹ Pom. Munic. Law (2d ed.), § 17.

CHAPTER II.

ORIGIN OF GOVERNMENT AND LAW.

SECTION 16. Various theories and schools.

17. Government and law divinely ordained.

18. The social compact theory.

19. The Hebrew theocracy.

§ 16. Various theories and schools.—The origin of government and law has been the subject of much discussion, presenting theories to a greater or less extent variant, and some even directly antagonistic. So pronounced and dogmatic were some of the various theories that they acquired the distinction of *schools*, having respectively their disciples and public advocates. Numbered among the champions of each were learned jurists, statist, publicists, metaphysicians, psychologists, political philosophers and theologians.

A discussion of the various schools, even in the main features of their respective theories, and the grounds on which they are based, would be inconsistent with the scope and purpose of the present treatise. Moreover, the time requisite for such a discussion may be more profitably spent, both by writer and reader, in other ways. The works of the writers referred to are accessible to all who may wish to become acquainted with their views, and would be more satisfactory at first hand, and in full, than in a second-hand abridgment. Prominent on the list of these writers are the names, among others, of Plato, Socrates, Cicero, Michaelis, Warburton, Hooker, Bacon, Hobbes, Puffendorff, Locke, Montesquieu, Bossuet, Kant, Savigny, Blackstone, Burke, Bentham, Austin, and Kent.

Ignoring minor agreements and differences among these and other writers on the subject in question, there are two general divisions which are quite sufficient for practical treatment and which, together, cover the whole ground and embrace the whole truth, namely: one, that civil government and law are divinely ordained; the other, that both originate in human authority, or, as generally expressed, in a social compact.

While these theories have been generally regarded and treated as antagonistic, they are not so in fact when rightfully understood and applied. Neither, alone, covers all the ground, and both are essential to a complete statement of the whole truth. This assertion may seem paradoxical at first view, but the explanation is simple: the *idea* and *necessity* of human government and law are divinely implanted in man, of which he is intuitively and inevitably cognizant; but no particular *form* of government or code of laws is ordained by God, these being wisely left to the intelligence and will of men in different times, under the varying conditions and needs of society.

§ 17. Government and law divinely ordained.—Government and law are the eternal thought of God, and the divine inheritance of man. In all the expressions of God's creative energy in the universe known to man, law is invariably manifest and regnant. Law is impressed upon, and inseparable from, all creatures and things, whether animate or inanimate, rational or irrational. The celestial orbs that wheel through space, and the pebble upon the beach; the mighty ocean, restless and sublime, and the tiny dew-drops that glitter in the morning sunbeam; the mountain pine that defies the tempest, and the little flower that blooms by the wayside, all are the

subjects of law. Law is order, and the existence of inherent disorder in God's creation is utterly inconceivable. It is not irreverent to affirm that the Creator could not launch the universe into existence without the impress of governing law. The assumption that God could or would create bodies or forces and send them forth a chaos of wild disorder and destructive collision would be nothing less than an impeachment of his wisdom, beneficence and power.

Astronomy teaches that our sun belongs to a cluster of eighteen millions of central suns, constituting a nebula which revolves as a unit around a common center. And the telescope reveals thousands of such nebulae, each cluster circling around its individual center, and the whole as a unit revolving around a common center; and thus on beyond the reach of human thought. Through all the ages great worlds have been hurled through the heavens with seventy times the velocity of a rifle ball; and all this stupendous and complicated machinery has moved with unerring precision.

As in the material universe, so is it, also, in the intellectual and spiritual: law is fundamental and universal.

From the earliest records of human history, government has existed among all the inhabitants of the earth, from the lowest condition of barbarism to the highest grade of civilization. There has, indeed, been a wide diversity of governments in form and character; but *government*, of some kind, has always existed among men, thus showing that it springs from an inborn instinct of humanity, and is a necessity of the social state.

The governmental instinct is manifest, also, in the animal creation, as is well known to all intelligent observers, and in some species of animals it is seen in practical development in a remarkable degree of perfection.

That human beings are endowed by their Creator with social instincts, and designed for commercial association, is universally known and conceded; and it is apparent to all intelligent thinkers that, with the inherent selfishness of unregenerate humanity, social living would be impossible without the presence of government and law. If, therefore, God designed the human race, his creatures, for the social state, he must have designed the necessary conditions of such a state. It does not follow that any particular *form* of government, or *system of laws*, was designed or prescribed; it was *government* and *law*.

That law is divinely ordained is expressly affirmed in the Bible, the highest authority on the subject. Paul, the great apostle, in his letter to the Roman Christians, in which he treats of civil government, says: "Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever, therefore, resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation (condemnation). For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same: for he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil. Wherefore ye must needs be subject, not only for wrath, but also for conscience sake. For, for this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing. Render therefore to all their dues; tribute to whom tribute is due; custom to whom custom; fear to whom fear; honor to whom honor."¹

¹ Romans 13: 1-7.

An eminent writer,¹ quoting this passage in support of the doctrine that government is a Divine institution, says: "The main points in the social theory of St. Paul, as here developed, are the following: That government is a divine appointment; that the civil magistrate is the minister of God, his representative and vicegerent, and that under every form of polity; that the end of government is the good of the governed; that the magistrate is invested with all needful power, both of rewarding and punishing; that obedience to the civil power is a religious duty; that conscience, more than fear, ought to constrain us to obedience; that punishment is in its nature vindictive, it is a vindication of justice, and therefore not wholly for the determent of others from the like crimes, and still less for the mere reformation of the criminal himself; and that those who serve the state in the magistracy are entitled, in return, to support and honor, from those over whom they are placed."

It is no answer to this reasoning, that in the civil magistracy are found weak, incompetent and even corrupt men, whose appointment to office cannot be ascribed to a holy and omniscient Creator and supreme ruler of the world. The theory in question, as we have seen, does not involve the prescription by God of any particular form of government or code of laws; nor does it contemplate the Divine appointment of civil magistrates, this function being devolved upon the people, to be exercised by them in accordance with their chosen systems of governmental polity, as will more fully appear in the next section.

§ 18. The social compact theory.—Having briefly discussed the theory of the divinely ordained origin of gov-

¹ Wines, "Laws of the Ancient Hebrews," p. 28.

ernment and law, there remains to be noticed what is generally termed the "social compact" theory. This term is here used in a general and comprehensive sense, embracing all theories touching the origin of civil government and law other than Divine ordination. The extreme advocates of the social compact theory reject the doctrine that civil government and law are divinely ordained, contending that they originate in human authority; and the two theories are regarded by some writers as wholly antagonistic.

The present writer holds that, rightly understood, there is no contradiction between the two theories; that each is sound, and both essential to a complete statement of the true doctrine. That, while the ultimate source of civil government and law is the Divine will, the secondary and immediate source is human authority. Reason and history concur in teaching that the form and character of government and laws for the establishment and order of society were wisely left to the choice and action of men in the successive periods and varying conditions of the race. It is obvious at a thought that no one structure of government, or code of laws, of which it is possible to conceive, would meet the circumstances and satisfy the wants of society in all the vicissitudes of human affairs.

Prof. Wines quotes from Dr. Gortin, a learned divine of the church of England, this sentence: "Government, both in church and state, is of God; the forms of it are of men," and adds:¹ "Hence, although the ultimate source of civil government is the Divine will, the immediate source of it may be, and certainly is, quite another thing. God has instituted no particular species of civil polity for all mankind, nor invested any particular persons with

¹ Wines, "Laws of the Ancient Hebrews," p. 35.

authority over their fellows. All forms of polity not subversive of the true ends of government, the preservation, perfection and happiness of man, are agreeable to his will. All civil rulers, kings, consuls, senators, presidents, governors, representative assemblies, and the whole body of the people exercising the functions of sovereignty, are equally his vicegerents, his ministers, ruling in his place, bearing the sword for him."

The same writer forcibly says further:¹ "It must be kept in mind that there are but two possible sources of civil power, viz., God and the people. The question is from which of these does the magistrate immediately receive his authority? Not, surely, from God. God does not designate the rulers of nations by special revelation; neither does He set distinguishing marks of dominion upon some men, and of subjection upon others. 'He does not,' as Sidney has forcibly said, 'cause some to be born with crowns upon their heads and others with saddles on their backs.' There must, therefore, be a real and proper sense in which it may be affirmed that the people are the fountain of political power; that political sovereignty resides in them as its spring and source; that the immediate original of sovereign authority is in human covenants; that it is competent for the people to retain or transfer it; that, in short, they are the sole judges of the forms they will give to their commonwealths, and of the powers and limitations of power which they will establish in them."

Upon this doctrine rests the right of revolution when the natural rights of subjects are destroyed, and the government becomes subversive of the purposes for which government is instituted. In such cases the people would wait in vain for a special revelation of God directing their

¹ Pages 40, 41.

decision; they would have to decide for themselves between submission to their wrongs or a resort to forcible revolution with its possible consequences. The latter alternative is justifiable when there is good reason to believe that a revolt would prove successful, and not inevitably result in a useless waste of blood and treasure, and cause a greater evil than that from which relief is sought.

§ 19. **The Hebrew theocracy.**—On a casual view it may seem that the Hebrew theocratic government and the Mosaic civil code of laws are inconsistent with the social compact theory. But on a careful examination the seeming inconsistency disappears. True, this government, in some of its features, was exceptional among historic governments, but in no wise conflicts with the theory that civil polity and law derive their immediate existence and authority from the popular will. The sacred record of the genesis of the Hebrew commonwealth reveals the fact that the theocratic government was not imposed upon the Israelites against their will, but was freely adopted by the people although inaugurated with a unique and stupendous ceremonial.

From Sinai God commissioned his servant Moses to visit the assembled Israelites on the plains and communicate to them his willingness to become their national king on condition that they would obey his voice and keep his covenant, and promising to them great and peculiar blessings and privileges on their compliance with the condition. Moses, in the prompt execution of his mission, communicated to the people, through their elders, God's message, and the people answered, "all that the Lord hath spoken we will do," thus accepting God as their civil ruler and promising obedience as loyal subjects. Moses returned the answer of the people to God, which completed the compact, nothing remaining but the ceremo-

nial of inauguration. On the third day thereafter, the people having prepared themselves for the event by divine direction, God came down upon the mount in awful majesty, and in the presence of the assembled Israelites talked with Moses, thus ratifying the covenant, formally inaugurating the Hebrew theocracy and authenticating the divine commission of Moses as God's vicegerent in the affairs of the nation.¹

The important transaction, thus briefly stated, constituted a *social compact*, nothing more or less; Jehovah proposed himself for the kingship of the nation, the civil ruler, as he was already the divine, and the people voluntarily accepted him as such, promising obedience to his government.

This view of the transaction, apparent on a careful study of the sacred record, is abundantly sustained by numerous writers exceptionally well qualified to speak authoritatively on the subject. Prominent among the number may be mentioned Jahn,² Dean Graves,³ Lowman,⁴ Michaelis,⁵ Dr. Spring,⁶ Warburton,⁷ Bossuet,⁸ and Wines.⁹

It will be observed that, in virtue of this compact, church and state were united under one administration, God being the head and ruler of both. This explains and justifies the penalty of death prescribed for idolatry by the Hebrew criminal code, which has been regarded by some as unduly severe, and even stigmatized as barbarous

¹ Exodus, ch. 19.

² "Hebrew Commonwealth," ch. 2.

³ "On the Pentateuch," p. 2, sec. 3.

⁴ "Civil Government of the Hebrews."

⁵ "Com. on the Laws of Moses," vol. 1, art. 34.

⁶ "Obligations of the World to the Bible," Gen. 3.

⁷ "Divine Legation," B. 5, sec. 2.

⁸ "Politique Sacrée," Liv. 1, art. 4.

⁹ "Laws of the Ancient Hebrews," p. 47 *et seq.*

Idolatry was not only a flagrant breach of the moral law but treason against the state, the most heinous crime known to the laws of civilized nations. Critics who characterize the punishment of this crime by the Mosaic law as barbarous should remember the penalty annexed to it by the English nation at one period of its history. Blackstone writes:¹ "The punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows and not be carried or walk; though usually (by connivance, at length ripened by humanity into law) a sledge or hurdle is allowed to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck and then cut down alive. 3. That his entrails be taken out and burned while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal."

Following the inauguration of a theocratic civil government came the promulgation of the Decalogue, which constitutes an epitome of principles and rules for the government of men in their relations to God, and to their fellow men; an ethical code transcribed from the infinite heart of God, and binding upon the human race through all time.

Then, in the order of events, followed the enactment of the Mosaic code, which constituted a complete system of civil law, embracing the rights, duties and obligations of citizens in their relations to each other and to the state; a system adapted to the condition of the Israelites at that time, but which, in subsequent developments and conditions, required and received modifications and changes,

¹ Com., vol. 4, p. 92; 2 Story on the Const., sec. 1298.

keeping pace with the growth, fortunes and needs of society.

The form of government thus established continued for about four hundred years, when, by the choice of the people and the permission of God, it gave place to monarchy, Saul being the first king.¹

This change, and others, in the form of government and laws during the Hebrew national existence, furnish additional evidence that the theocratic organization is rightly characterized as a social compact.

It is an interesting fact that, while some provisions found in the Mosaic code would be inapplicable to present civilizations and social conditions, in others may readily be discerned the germs of English and American municipal law. This will appear in a subsequent chapter of the present treatise, which points to the sources of our law.²

¹ 1 Samuel, ch. 8 *et seq.*

² *Post*, ch. II.

CHAPTER III.

RELATIONS BETWEEN THE GOVERNMENT AND ITS SUBJECTS.

SECTION 20. Necessity of human governments and laws.

21. Government defined.

22. Reciprocity.

23. Classification of rights.

24. Rights subject to conditions and forfeiture.

25. The right of personal security.

1. Life.

2. Limbs and body.

3. Health and reputation.

26. The right of personal liberty.

27. The right of private property.

28. The right of religious belief and worship.

29. Relative rights.

30. Other classifications of rights.

1. Public and private rights.

2. Civil and political rights.

3. Rights of persons and rights of things.

4. Legal and equitable rights.

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DUTIES AND OBLIGATIONS OF SUBJECTS TO THE GOVERNMENT.

31. Allegiance.

32. Obedience.

33. Support.

1. Office bearing.

2. Taxation.

3. Eminent domain.

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5. Military service.

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ENFORCEMENT OF RIGHTS AND DUTIES.

34. Power, and means of enforcement, essential.

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39. The writ of *habeas corpus*.

DUTIES OF SUBJECTS TO THE GOVERNMENT, HOW ENFORCED.

40. Allegiance.
41. Obedience.
42. Support.
 1. Office bearing.
 2. Taxation.
 3. Eminent domain.
 4. Police power.
 5. Military service.

§ 20. **Necessity of human governments and laws.**—As clearly shown by the evidence presented in the last preceding chapter, human government was divinely ordained for the human race in social relations. The existence and recognition of individual rights is a necessity of society. Violation of rights constitutes wrongs which inevitably occur to a greater or less extent under all forms and conditions of civic polity hitherto known; and which will continue to occur until humanity shall have experienced thorough regeneration. If violated with impunity rights are valueless, if not even injurious, being the occasion of suffering from wrongs. Hence the necessity of judicial and executive power in human governments to enforce rights and punish wrongs. From this necessity arises governmental organizations and systems of jurisprudence.

§ 21. **Government defined.**—The term “government,” as used in this chapter, expresses the ruling authority or aggregate of authorities, in a political society, state, commonwealth or nation. The term is often used in legal

literature interchangeably with "state," "nation" and "administration." In strictness of definition, however, these terms have not precisely the same meaning. For example, "state," "nation" or "commonwealth" imports a body politic or political corporation, within certain territorial limits, organized for the mutual protection and general welfare of its constituents, which, in a republic, are the sovereign people; while the term "government" signifies the authority, aggregate of authorities or departments, by which the sovereignty of the people in their political capacity is exercised. "Administration" means the officials elected or appointed to exercise in a representative or executive capacity the authority of government.¹ With this explanation the convenient term "government," as used in this work, will not be misunderstood or misleading.

§ 22. Reciprocity.—Stated in a general and comprehensive way, the relative rights, duties and obligations of government and its subjects are reciprocal or correlative. Subjects have rights which the government is bound to protect and vindicate; in consideration of which the subject owes to the government allegiance, obedience, and support. The interests of the respective parties to this relation are one, both theoretically and practically; and there should be no antagonism between them. Especially is this true in a republican form of government in which the people are the ultimate source of power, and responsible for the character of the laws and the administration of public affairs. If a bad law be en-

¹ 1 Story, Const., § 207 *et seq.*; Cooley, Prin. of Const. Law, ch. II; 1 Bl. Com., p. 47 *et seq.*; 1 Sharswood, Bl., pp. 48, 127, 128; Virginia Coupon Cases, 117 U. S. 290; Grist v. Child, 21 Wall. 450; Stone v. Mississippi, 101 U. S. 820; And. Law Dic., title "Government;" Bouv. Law Dic., title "Government."

acted by the legislature, or an unwise policy adopted by an administration, the people have the remedy in their own hands, which may be effected in an orderly way without any breach of the peace or disturbance of organic relations. They can repeal the obnoxious law, or secure a different policy through a change of administration, by constitutional methods. It accomplishes no useful purpose, and is highly criminal, for an association of citizens living under the protection of a popular government to which they owe allegiance and support, to repudiate its lawful claims, seek its destruction, and inaugurate anarchy and social chaos!

Hardly less justifiable are some of the labor combinations which have afflicted society in recent years, and caused immense suffering and loss. While not to be characterized as criminal in their inception and purpose, they tend to dangerous extremes in measures, and not infrequently lead to crime. The leaders and officials, in many cases, are the only persons benefited, while their deluded followers reap poverty and distress.

There may be, and doubtless are, cases of oppression and injustice which excuse, if they do not justify, extreme measures of redress; but in such cases, even, wisdom dictates caution in the selection of remedies which are liable to prove in their consequences worse than the disease.

Moreover, extreme remedies of doubtful propriety for real or fancied wrongs, not only often disappoint the hopes and aggravate the grievances of the individuals immediately concerned, but result in serious public injury by disturbing the adjustment of productive industry, and producing a harvest of pauperism and crime.

§ 23. Classification of rights.—Rights of the subject are generally divided into *absolute* and *relative*. This classification is adopted for convenience of treatment and

study, rather than for strict accuracy of definition, as some rights classed as *relative* are clearly within the description of *absolute* rights.

Absolute rights consist of personal security, personal liberty, the acquisition and enjoyment of property, and the right of religious liberty and worship.

Relative rights belong to the subject in his social relations, and are principally embraced in the four relations of husband and wife, parent and child, guardian and ward, and master and servant, but are not limited to these relations as might be inferred from the manner in which the classification is presented in some of our elementary works.

Speaking of the two classes, Judge Cooley says¹ that absolute rights "are few and simple, while such as are relative will be far more numerous and complicated. It may be added also that relative rights are constantly increasing in number and complexity as wants and desires increase with advancing civilization and new inventions and improvements."

The line drawn between absolute and relative rights is, it must be conceded, to some extent arbitrary; but no more natural and accurately distinguishing division is obvious, and this has become so firmly established that its recognition is a convenience in legal study and judicial discrimination.

Some of the rights classified as relative are entitled to rank as absolute. For example, the relations of husband and wife and parent and child were ordained by God in the genesis of our race, and the rights essential to the existence and enjoyment thereof were divinely established as belonging to, and inseparable from, the rights them-

¹ 1 Cooley's BL., p. 124, n. (5).

selves. Hence they are natural and inherent, as really and fully as are some of the rights classed as absolute.

Blackstone, treating of absolute and relative rights, seems to minimize the duty of government to protect the latter. He says,¹ "the principal aim of society is to protect individuals in the enjoyment of those absolute rights which are vested in them by the immutable laws of nature; but which could not be preserved in peace without that natural assistance and intercourse which is gained by the institution of friendly and social communities. Hence, it follows that the first and primary end of human laws is to maintain and regulate the *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies; so that to maintain and regulate is clearly a subsequent consideration. And therefore the principal view of human law is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple; and then such rights as are relative, which, arising from a variety of connections, will be far more numerous and more complicated."

If this language admits of no construction other than that above suggested, its soundness may reasonably be questioned, especially in view of the important relations of husband and wife, and parent and child, which are classed with relative rights.²

§ 24. Rights subject to conditions and forfeiture.—All the rights of the subject are held in subordination to constitutional authority, the rightful claims of government, the established principles and rules of law, necessity, which knows no law, and a due regard to the

¹1 Cooley's Bl., p. 124.

²2 Kent, Com. (5th ed.), p. 74.

rights of co-subjects. Rights may be forfeited and lost by an unlawful use which is subversive of the rights of others or hostile to the safety and welfare of the state. *Salus populi suprema lex*, is the highest human law, and clothes the government with indefinable power.¹

It should be noticed in this connection, that in the organization of a government to which the subject is an acting or consenting party he voluntarily surrenders part of his natural rights in consideration of the protection received from the government for the rest, and for other benefits accruing to him from a constitutional government.²

§ 25. **The right of personal security.**—This is a very comprehensive right, including security to life, limbs, health, and reputation, from all unlawful and injurious acts.³

1. *Life.*—Human life is the breath of God, and a mystery of the ages. In the view of law, both Divine and human, it is the first and highest right of man, as without it there is nothing on which to predicate any other right, absolute or relative. Being the gift of God in trust, the government has no right to take it, except in case of its forfeiture for crime; a fellow subject has no right to take it unless in self-defense, or by authority of law; nor has the subject any right to take his own life. Both duty and interest concur in requiring of the gov-

¹ 1 Kent, Com., pp. 12-26; 1 Bl. Com., pp. 123-129; Cooley, Const. Law, pp. 414-465; Broom, Leg. Max., pp. 1-10.

² Pom. Munic. Law, § 622; Wiggins Ferry Co. v. East St. Louis, 102 Ill. 569.

³ 2 Kent, Com. (5th ed.), pp. 12-15; Id., pp. 16-19; Pom. Munic. Law, §§ 366-372; 1 Cooley's Bl., pp. 123-145, and notes; 2 id., p. 118 *et seq.*; 4 id., ch. XV; Rob. El. Law, §§ 21-29.

ernment protection to the life of the subject; duty, growing out of the relation of government and subject; interest, which the government has in the life of the subject as a component part of itself, and in his allegiance and support.¹

2. *Limbs and body.*—Security of life involves protection of life's tenement, the body, including all its parts. But in legal discrimination the limbs, and notably the hands, eyes and front teeth, stand first as subjects of protection by reason of their fighting value, especially in self-defense. The origin of this discrimination may be traced to an early period of history, when individual belligerent encounters with nature's weapons were more common, and personal prowess more necessary for protection, than in the present age of a higher civilization and a more enlightened jurisprudence.² It is noticeable that, while the *hands* were regarded as important instruments of personal attack or defense, the *feet* are not mentioned. Perhaps the idea of running away did not occur to our hardy and fearless early progenitors. Nevertheless, this might be the only means of safety in some emergencies where the feet would be more serviceable than the hands. And sometimes discretion is the better part of valor:

“For he who fights and runs away
May live to fight another day.”

3. *Health and reputation.*—The greater contains the less; and hence, security of life includes protection of health and reputation, without which life itself would not be worth preserving.

¹ Cooley's Bl., p. 129; 2 id., pp. 187-192.

² 1 Bl. Com., p. 130; Rob. El. Law, § 26; Pom. Munio. Law, §§ 634-638.

§ 26. **The right of personal liberty.**—Personal liberty is universally held and cherished as the most precious right of humanity, next to that of life. Indeed, life itself without liberty, or the hope of liberty, is often deemed a curse rather than a blessing. The confident statement of the Devil, in his vain attempt to impeach Job's integrity, that¹ "all that a man hath will he give for his life," is not universally true, as the "father of lies" well knew.

This right, says Blackstone,² "consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct without imprisonment or restraint, unless by the course of law."

Says Chancellor Kent:³ "Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner in which the restraint is effected."

The right of personal liberty, with other natural rights, claimed by Englishmen to be recognized by the constitutional law of the realm, but sometimes impaired by unlawful usurpations of power by reigning sovereigns, was finally secured to them by *Magna Charta*, forcibly wrested from King John in 1215, and afterwards confirmed by parliament, notably by what is known as the *Petition of Right* (1626), the *Habeas Corpus Act* (1679), and the *Bill of Rights* (1689).

These rights were claimed by our colonists as their inheritance from the mother country, and carefully secured to the people of the United States by the federal constitution.⁴

¹ Job, ch. II, v. 4.

² 1 Cooley's Bl., p. 134 and note.

³ 2 Kent's Com., p. 26.

⁴ Cooley, Princip. Const. Law, pp. 6-9; 1 Cooley, Bl., pp. 125-138; 2

The definition of personal liberty generally found in our law books fails to express the full import of the term, being limited for convenience of discrimination in the discussion of absolute rights. This right is not confined to freedom of locomotion and all it implies, but embraces all acts performed in obedience to one's own will which are not in violation of law, human or Divine, or subversive of the rights of others.

In commenting upon natural rights, Judge Story well says:¹ "It should be observed of the terms, life, liberty, and property, that they are representative terms and are intended and must be understood to cover every right to which a member of the body politic is entitled under the law. The limbs are equally protected with the life; the right to the pursuit of happiness in any legitimate calling or occupation is as much guaranteed as the right to go at large and move about from place to place. The word "liberty" here employed implies the opposite of all those things which, beside the deprivation of life and property, were forbidden by the Great Charter."

§ 27. The right of private property.—The right to acquire, possess and enjoy private property is essential to the highest development and greatest happiness of man, as well as to the peace and welfare of the state.

This right has been recognized, cherished and tenaciously defended in all ages of the world. The idea of complete dominion over external things, of exclusive possession and enjoyment which the right of private prop-

Kent, Com. (5th ed.), pp. 26-30; Bac. Abr., Duress, Trespass, D. 3; Add. Torts, pp. 697, 698; Re Jacobs, 98 N. Y. 98, 106; Snyder v. Warford, 11 Mo. 515; Bouv. Law Dic., title Liberty; Preamble of U. S. Const.; 2 Story, Const., § 1950; Amend. U. S. Const.; 1 Story, Const., §§ 303-305; Dec. Am. Ind.

¹ 2 Story, Const., § 1950.

erty confers, is powerfully attractive to man. It ministers to the love of power which is universal in the human race; it feeds acquisitiveness and responds satisfactorily to the demands of self-love and selfishness.

The origin of this right has been the subject of much discussion by publicists, revealing some diversity of opinion. The writer accepts as correct the view of Chancellor Kent, who says:¹ "The sense of property is inherent in the human heart, and the gradual enlargement and cultivation of that sense from its feeble force in the savage state, to its full vigor and maturity among polished nations, forms a very instructive portion of the history of civil society. Man was fitted and intended by the Author of his being for society and government, and for the acquisition and enjoyment of property. It is, to speak correctly, the law of his nature; and by obedience to this law he brings all his faculties into exercise and is able to display the various and exalted powers of the human mind."

We have it upon the highest authority that in the infancy of our race the wise and beneficent Creator gave to man "dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth."² This is a publication of the law written upon our nature by the same Author.

It is interesting and instructive to trace the development of the right of private property from its early recognition to the present time. It is now generally held by writers of acknowledged authority that *occupancy* gave the first title to private property.³ Referring to the

¹ Kent, Com., p. 318.

² Gen., ch. I, v. 26.

³ Kent, Com., pp. 318, 319; 1 Cooley, Bl., p. 399; 1 Sch. Pers. Prop., Introductory chapter; 2 id., pp. 6-8.

germinal period of legal ideas, we find that the first user of a thing acquired a property therein by common consent, which property was understood to continue so long as the exclusive *use* or *occupancy* continued; hence, the doctrine that occupancy gave the first exclusive right to lands and movables. The *right* of possession was limited to the *act* of possession, the right ceasing with the occupancy.

In the progress of events it became apparent that the use, only, during actual possession would not satisfy the wants of society, which required recognition of title to the *substance* of the thing used. This advance idea was a corollary of the primary natural sense of property, as well as a practical necessity; and it became the established law of property. The next step in advance, the right of transferring title to both the *substance* and *use*, was natural and logical. Thus, advancing step by step as the wants of society and reason dictated, was developed that just and enlightened system of principles and rules which constitutes our law of property. Briefly stated, the order of evolution was, first, the right of occupancy; second, a right to the substance of the thing possessed; and third, the right to transfer both the substance and possession.¹

§ 28. The right of religious belief and worship.—Despotism in any form, and under all circumstances, involves a dangerous exercise of human power, and often proves destructive of human rights. But in no case is it more dangerous, or more repugnant to justice, than in its attempts to bind the conscience of men in the iron fetters

¹ 2 Kent, Com., pp. 317-340; Pom. Munic. Law, §§ 669-672; 1 Bl. Com., p. 139; 2 id., pp. 1-6; Boston, etc. R. Co. v. Salem, etc. R. Co., 2 Gray, 35; Moffett v. Moffett, 67 Tex. 664; Harwood v. City of Lowell, 4 Cush. 313; Southard v. United States, 4 Pet. 512; 9 id. 13; 10 id. 329.

of human law; and this whether moved by the caprice of tyrannical rulers, or induced by religious bigotry. It is an audacious usurpation of the Divine prerogative, a presumptuous intermeddling in the spiritual relations of man to his Maker, and directly affects interests which extend beyond the boundary of time. The exercise by despotic power of the assumed right to control the consciences of men, and dictate their religious belief and worship, has deluged the earth with the blood of martyrs.

The long and determined struggle for the recognition by governments of this natural right of the governed has never been crowned with complete success until within a comparatively recent period; and in a large portion of the earth religious liberty is still unknown.

Without referring specifically to other nations, it may be affirmed that, by the constitution and laws of the United States, this inestimable right is distinctly recognized, and its enjoyment guaranteed to every citizen.

The federal constitution contains this provision: "No religious test shall ever be required as a qualification to any office or public trust under the United States."¹ And the first amendment of the constitution, proposed by the First Congress on the 25th of September, 1789, and subsequently ratified by the states, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."² And now, in all the states of the Union, this right is enjoyed, either by constitutional provision, statutory enactment, or by force of public opinion.

¹ U. S. Const., art. VI, ch. 3.

² Amendment, art. I; 2 Story, Const., §§ 1869-1879; 2 Kent, Com. (5th ed.), pp. 34-36; 4 Bl. Com., pp. 45-47; Cooley, Princip. Const. Law, pp. 205, 208; *Watson v. Jones*, 13 Wall. 728; *United States v. Bennett*, 16 Blatchf. 559, 560; *Ex parte Garland*, 4 Wall. 333; And. Law Dic., title "Religion."

§ 29. **Relative rights.**—The prominent rights of this division, as we have seen,¹ are included in the four relations of husband and wife, parent and child, guardian and ward, and master and servant; but these relations do not embrace all the rights of this class, which are numerous, and increasing in number and variety with the wants of society in advancing civilization. The plan and scope of this work will not permit a discussion of the principles and rules of law governing this class of rights, a full treatment of which may be found in reliable text-books devoted exclusively to the several subjects involved.

§ 30. **Other classifications of rights.**—The classification already mentioned includes in its scope and the principles involved, all the rights of the subject demanding recognition by the government.

But some of these rights are embraced in other classifications found in our books, which are utilized for convenience of illustration. A brief notice of these classifications, in passing, may prevent confusion and misunderstanding.

1. *Public and private rights.*—Public rights are those belonging to the government; private rights are such as belong to natural persons, and corporations when they act in a private capacity.

2. *Civil, and political, rights.*—Civil rights are those which belong to a subject of government, whether natural and inherent rights, or such as are accorded by the constitution and laws of an organized state. In this class are obviously included the rights embraced in the classification, *absolute* and *relative*.

¹*Ante*, § 23.

Political rights are such as entitle the subject to participate in the administration of government.

This class of rights, it should be known, includes the right or privilege of suffrage, which is sometimes deemed a *natural*, instead of a *political*, right, by extremists who have a "zeal that is not according to knowledge."

3. *Rights of persons, and rights of things.*—The rights of persons are properly defined as "those which concern and are annexed to the persons of men, and are then called *jura personarum*, or the rights of persons." The rights of things are "such as a man may acquire over external objects, or things unconnected with his person, which are called *jura rerum*, or the rights of things."¹ This definition has been criticised as implying the personality of things; but what is meant by "rights of things" is made so clear in the definition itself, that no misunderstanding can arise from the form of expression.

4. *Legal and equitable rights.*—Legal rights are those where the party has a legal title to a thing, and for an injury to, or deprivation of, the same, he has a remedy in an action at law; and this, even though he may have only a possessory title, with no personal or beneficial interest therein, holding the title and possession as trustee for the beneficial owner.

Equitable rights are briefly defined as "those which may be enforced in a court of equity by the *cestui que trust*," or beneficiary. A trust is defined as "a right of property, real or personal, held by one party for the benefit of another." The legal title to the property is in the trustee, the equitable title in the *cestui que trust*, or beneficiary.²

¹ 1 Cooley's Bl., p. 121, and n. (2); Id., p. 123, n.; 2 id., p. 1.

² Story, Eq. Jur., § 25; Pom. Eq. Jur., § 98.

5. *Perfect and imperfect rights.*—These are defined as follows: “When the things which we have a right to possess, or the actions we have a right to do, are or may be fixed and determinate, the right is a perfect one; but when the thing or the actions are vague and indeterminate, the right is an imperfect one.”¹

This classification is of very little, if any, practical importance.

DUTIES AND OBLIGATIONS OF SUBJECTS TO THE GOVERNMENT.

§ 31. *Allegiance.*—The first, and a fundamental, obligation of the subject to his government is that of allegiance. It is the tie which binds the subject to his government in return for the protection due him from the latter. The relation and obligation is well expressed by the late Justice Field of the United States Supreme Court, as follows:² “Allegiance is the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to the sovereign, in return for the protection which he receives. . . . It may be an absolute and permanent obligation, or a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or, at least, until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or sovereign. An alien whilst domiciled in a country owes a local and temporary allegiance which continues during the period of his residence.” *Natural* allegiance is that which is due from all men born within the dominions and under the protection of the govern-

¹ Bouv. Law Dic., title “Rights,” § 5; Ruterforth, Inst., ch. 2, § 4; Grotius, lib., ch. 1, § 4.

² Carlisle v. United States, 16 Wall. 154.

ment. *Acquired* is that which is due from a naturalized citizen. *Local* allegiance is that which is due from an alien while within the dominion and under the protection of a government.

The allegiance of a legitimate child follows that of the father; an illegitimate, that of the mother, it being *nul-lus filius*. A person born on the ocean is a subject of the government to which his parents owe allegiance. The child of an ambassador is the subject of the government represented by such ambassador, although born in the dominions and under the protection of a foreign government.¹

The right of changing one's allegiance has given rise to considerable discussion, and to some contrariety of opinion among jurists and publicists. In the present state of the discussion it is difficult to lay down with confidence any positive and generally accepted rule on the subject. It would seem from the authorities that, until within a comparatively recent period, the doctrine generally obtained that a subject had no power to voluntarily sever his relations with the government. This rigid rule, however, has been so far relaxed that when a citizen in good faith renounces allegiance to his government, and with its consent or without objection becomes the subject of another power, the former government has no further claim upon him. It is held, however, that when a citizen is abroad, for a longer or shorter period, with no manifest intent of renouncing allegiance to his govern-

¹ 1 Cooley's Bl., p. 365, and n. (1); Id., pp. 369, 370; Kent, Com. (5th ed.), pp. 39, 44, 49, 63, 64; Whart. Com. Am. Law, §§ 177, 256, 432; *Inglis v. Trustees of Sailors Snug Harbor*, 3 Pet. 155; *Shanks v. Dupont*, id. 242; *Ludlam v. Ludlam*, 26 N. Y. 356; And. Law Dic., title "Allegiance;" Bouv. Law Dic., title "Allegiance;" Whart. Com. Am. Law, §§ 256-260, 431-437; Whart. Conf. of Laws, § 35.

ment, he may be authoritatively called home when his services are there required. And it seems to be held by American authorities, that no native-born subject can so far cancel his obligations to his government, by avowing allegiance to another in whose dominion he may be sojourning, as to free himself from the claims of his native country, should his government need and demand his services.¹

The federal constitution confers upon congress power to "establish an uniform rule of naturalization."² In the exercise of this power congress has opened a wide door to foreigners, who have come to the United States in large numbers, some to the advantage of this country, and others to the advantage of the countries whence they came. The power to confer citizenship by naturalization in this country is vested exclusively in congress;³ but naturalization is effected by annexation of one country and sovereignty to another; the subjects of the former become the subjects of, and owe allegiance to, the latter, in virtue of the annexation, without any formal process of naturalization.⁴

It should be noticed that tribal Indians, under our constitution and laws, are not citizens unless expressly made so by special laws.⁵

§ 32. Obedience.— Webster defines obedience, "compliance with that which is required by authority." The essence of government is authority; and hence, compliance

¹ 1 Bishop, New Crim. Law, § 512; Whart. Com. Am. Law, §§ 177-180;
² 3 Greenl. Ev., § 237.

³ U. S. Const., sec. 8, ch. 4; Id., Bulwell's ed., p. 20.

⁴ Chirac v. Chirac, 2 Wheat. 259; Whart. Conf. of Laws, § 431.

⁵ Whart. Com. Am. Law, § 433; Minor v. Happersett, 21 Wall. 163.

⁶ Whart. Com. Am. Law, §§ 265, 434; Whart. Conf. of Laws, § 559.

with its lawful requirements is obedience. A nominal government, without power to enforce its laws and requirements, would be the form without the substance, a practical nullity. Government issues its mandates through the instrumentality of its official administrative agencies, its legislative, executive and judicial departments. Each department is charged with certain functions and clothed with adequate authority for their effective performance; and obedience involves compliance with all constitutional laws, judicial decrees and executive mandates.

There are various forms of government in the world; but whatever the form, each embraces in its administration the functions and authority of the three departments, legislative, judicial, and executive. And this, whether all the governmental power is vested in one person, an absolute sovereign, or divided into departments and distributed among different officials. Whatever the form of government, laws must be made, construed and executed by the ruling power.

In the United States, the federal and state constitutions determine the framework and machinery of government, and prescribe the functions, duties and powers of each department. Herein may be seen the value of a written constitution which tends to prevent usurpations of power and embarrassing conflicts between different departments and functionaries of government, and furnishes, moreover, an ark of safety for the people.

§ 33. Support.—Government is not automatic; its administration requires extrinsic motive power and intelligent guidance. To its support the subject is bound to contribute whatever may become necessary in return for the benefits received. This duty applies with special force to citizens of a republic, in which the government

is their own creature, and its administration in their own hands. Stated generally and comprehensively, the subject owes to his government the moral support of allegiance with all it implies, and a patriotic *animus*. No government worth preserving can be safe and prosperous without the loyalty and love of its subjects; with these in full development and activity all the requisites to its support will naturally and certainly result.

The general duty of support includes several particulars:

1. *Office bearing*.—Government being a public corporation, an artificial personality, its administration is necessarily conducted through the instrumentality of agents, its official representatives. These, in a popular government, are taken mainly from its subjects by election or appointment; and it is the duty of citizens when duly called to accept office and faithfully perform the trust.

Generally there is little difficulty in finding patriotic, self-sacrificing men who are willing to accept the duties of office with its incidents of emolument and honor.

2. *Taxation*.—It is the duty of subjects to contribute to the expenses of government. Obvious and reasonable as this duty is, there is none more distasteful to the subject, or the enforcement of which is more perplexing to the government. In the vocabulary of politics there is no term more hateful to the masses than that of "taxation." This is due in part to the oppression from which subjects have sometimes suffered from the arbitrary and unjust exercise of the taxing power; in part from the fact of the compulsory nature of this contribution to the government; but in larger part, probably, from ignorance of the necessity and machinery of taxation. In a republican form of government, where taxpayers are law-makers, friction in the administration of public affairs ought not

to occur; but a radical and full remedy for all the evils incident to the administration of human governments must await a radical change in human nature. It is a well established elementary legal doctrine that government has a rightful claim upon so much of the property of its subjects as may be necessary for its maintenance and due administration.¹

In the United States taxation is regulated by constitutional and statutory law. The federal government and the state governments, respectively, each under its own constitution and laws, and within its own sphere, has a prescribed and well defined system of taxation.²

There are two kinds of taxes: *direct* and *indirect*; the latter under the names of "duties," "imports," "excises" and "tariffs." Direct taxes, it is hardly necessary to add, are more distasteful and troublesome than indirect, because more sensibly realized and keenly felt.

3. *Eminent domain*.—The citizen holds his private property subject to the right and power of the government to take it for public use under the prerogative of eminent domain. But for the due and lawful exercise of this right by the government, certain conditions are essential; first, the use for which the property is taken must

¹ 2 Story, Const., § 1955; Smith, Pers. Prop., § 3, sub. 3; 1 Sch. Pers. Prop., pp. 22-24; Cooley, Const. Law, pp. 54-62; Cooley, Const. Lim., pp. 479-521.

² U. S. Const., art. I, sec. 8, cl. 1; sec. 9, cls. 4-6; sec. 10, cls. 2, 3. See Bout. Ed. of R. S. of U. S., pp. 19, 21, and cases cited; 1 Story, Const., §§ 950-957; 2 id. §§ 1077-1097; Cooley, Princip. Const. Law, p. 69; 1 Kent, Com., pp. 254-392; Gibbons v. Ogden, 9 Wheat. 1; Brown v. Maryland, 12 Wheat. 419, 437; Law v. Austin, 13 Wall. 29; Case of State Freight Tax, 5 Wall. 232; Passenger Cases, 7 How. 283; Henderson v. New York, 92 U. S. 259; Sinnott v. Davenport, 23 How. 227; Steamship Co. v. Port Wardens, 6 Wall. 31; Hall v. Decuir, 95 U. S. 485; Welton v. Missouri, 91 U. S. 275.

be a *public* or *quasi-public* use; it cannot be taken for private use or for the benefit of private persons, natural or artificial; second, the right must be exercised under and in accordance with legislative provisions; and third, provision must be made for just compensation to the owner for the property so taken.¹

4. *The police power.*—The police power of government, to which the subject owes submission, is well defined thus: “The authority to establish, for the intercourse of the several members of the body politic with each other, those rules of good conduct which are calculated to prevent a conflict of rights, and insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a corresponding enjoyment by others, is usually spoken of as the authority or power of police.”² To this definition its author adds,—“This is a most comprehensive branch of sovereignty, extending as it does to every person, every public and private right, every thing in the nature of property, every relation in the state, in society, and in private life.” The maxim

¹ Cooley, Princip. Const. Law, pp. 331-342; 1 Cooley, Bl., p. 138, and notes 18 and 19; 2 Story, Const. Law, § 1956; Cooley, Const. Lim., pp. 523-571; Kohl v. United States, 91 U. S. 367; Weber v. Harbor Commissioners, 18 Wall. 57; Pollard's Lessee v. Hagan, 3 How. 212; Nichols v. Bridgeport, 23 Conn. 189; Rust v. Bingham, 117 Mass. 307.

² Cooley, Princip. Const. Law, p. 227; 2 Story, Const., § 1954; Cooley, Const. Lim., p. 683, and cases cited; Potter's Dwar. on Statutes, ch. 14; Broom, Leg. Max. (4th Am. ed.), p. 247; Commonwealth v. Alger, 7 Cush. 84; Thorpe v. Rutland & Burlington R. R. Co., 27 Vt. 149; Vanderbilt v. Adams, 7 Cow. 351; People v. Shepard, 36 N. Y. 286; License Cases, 5 How. 504; Brown v. Maryland, 12 Wheat. 419; Lincoln v. Smith, 27 Vt. 335; Bradford v. Stevens, 10 Gray, 379; State v. Robinson, 49 Me. 285; Reynolds v. Geary, 2 Conn. 179; Jones v. People, 14 Ill. 196; Santo v. State, 2 Iowa, 202; Commonwealth v. Kendall, 12 Cush. 414.

Salus populi suprema lex is the foundation of this power, and the vindication of its exercise.

5. *Military service*.—Without the voluntary performance of this duty by the subject, and in the lack of authority and power in the government to enforce it, the latter would be helpless in case of invasion or insurrection. Hence, under all forms of government the duty of the subject to perform military service when the public exigency requires it, and the power of the government to enforce its performance, are fundamental and essential.

Under the provisions of the federal constitution, congress is invested with the national war power.¹

By reference to all the provisions of the federal constitution on the subject, and the authorities cited below, it will be seen that the power of the states is subordinated to that of congress.²

6. *Miscellaneous duties*.—In addition to the specific duties above mentioned, it is the duty of the citizen, when lawfully required, to aid in the pursuit and arrest of criminals, to assist executive officers in the discharge of their duties, to serve on juries, and to otherwise render such service in the public interest as may be required by law.

¹ U. S. Const., art. I, § 8, cls. 11-16; R. S. of U. S. (Bout. ed.), p. 20, and cases cited. And see Cooley, Princip. Const. Law, pp. 88, 89; 2 Story, Const., §§ 1197-1216; Kent, Com., pp. 262-266; 1 Bl. Com., XIII; 1 Cooley, Bl. p. 406, n. (1); In re Griner, 16 Wis. 423; Houston v. Moore, 5 Wheat. 1; Martin v. Moot, 12 Wheat. 16; Kneedler v. Lane, 17 Pa. St. 238; Luther v. Borden, 7 How. 1.

² U. S. Const., art. I, sec. 10, cls. 1 and 3; R. S. of U. S. (Bout. ed.), pp. 21, 22, and cases cited; Cooley, Princip. Const. Law, pp. 88, 89; 2 Story, Const., §§ 1197-1216, 1490-1492; 1 Kent, Com., pp. 262-266; 1 Cooley, Bl. p. 406, n. (1). And see *post*, ch. VII, "Military and Martial Law."

ENFORCEMENT OF RIGHTS AND DUTIES.

§ 34. Power and means of enforcement essential.—

Having summarized the reciprocal rights and duties of the government and its subjects, it is in order to inquire how those duties and rights respectively may be enforced. Obviously the value of a right depends upon the ability and means of enforcing it.

As the mutual interests of the government and its subjects demand the faithful performance of the duties, and the full enjoyment of the rights, of each, compulsory intervention ought to be unnecessary; but such an ideal state of human affairs must await for its realization a higher degree of general intelligence, and a more controlling sense of moral obligation, than at present exist among men. Hence the necessity of protecting rights and enforcing duties by law, organic, statutory and judicial; and this may require the authority and action of the several departments of government, legislative, executive and judicial, each in its own sphere.

A full discussion of this branch of the subject would far transcend the assigned limits of this work, the design of the writer being to present only a condensed outline of the broad field of juridical law, with its several divisions, and to furnish true guides to its exploration.

ENFORCEMENT OF THE GOVERNMENT'S DUTIES TO ITS SUBJECTS.

§ 35. What these duties involve.—It is the duty of government to recognize, guarantee and protect the rights of its subjects. And full protection requires the agency of civil, criminal and penal law, involving all the powers and functions of government in its legislative, executive and judicial departments.

A discussion of the enforcement of rights necessarily involves the consideration of wrongs and their punishment, as the violation of a *right* is the commission of a *wrong*.

§ 36. Wrongs by the government itself.—These may consist of torts and crimes committed by the officers of government, executive, judicial and ministerial; or wrongs by abuse of governmental prerogatives, unwarranted legislation and official corruption. Against the former the ordinary machinery of justice affords adequate protection and redress. But protection and vindication in the latter class of wrongs can be effected only through extraordinary remedies, exceptional and constitutional, which the government is under obligation to provide and administer to the full extent necessary for the protection of the citizen. Should the government become so corrupt, oppressive, or inefficient as to lack the will or power to enforce the rights and redress the wrongs of its subjects, revolution by the latter as a *dernier* resort would be in order, and justifiable.¹

§ 37. Wrongs by foreign governments.—It is also the duty of government to protect its subjects against wrongs by foreign governments, whether committed directly by such government itself or by a citizen thereof whose wrong it sanctions and protects. In either case, if the government of the injured party should perform its duty, the question would become international, and be settled by diplomacy, arbitration, or war.²

¹ 1 Story, Const., § 533; Cooley, Const. Law, pp. 144-159; Add. Torts (Dudley & Baylies' ed.), p. 38; Cooley, Torts, pp. 376-425; 1 Cooley, Bl. (3d ed.), p. 55; 2 id., p. 21.

² Woolsey, Int. Law, § 116; 1 Kent, Com. (5th ed.), p. 46 *et seq.*

§ 38. Wrongs against subjects by co-subjects.—These wrongs are numerous and varied in their character, arising from, and incident to, the social and business relations and affairs of life. They are to a large extent remediable by civil law through judicial proceedings established for the purpose. But ordinary civil remedies proving inadequate to the purpose, in some cases, they are supplemented by criminal law, both for the vindication of governmental authority, and the protection of individual rights.

It should be noticed in this connection that wrongs, in their character and effect, consist of two classes, *public* and *private*; the former being such as directly and injuriously affect the government; the latter such as are direct violations of individual rights. In legal terminology public wrongs are *crimes*, and punishable by the government under its criminal code; private wrongs are denominated *torts*, for which the injured party has redress under the provisions of the civil code.

There are some wrongs, however, which are both crimes and torts — crimes as against the government, and torts as against the injured subject, both government and subject being thereby immediately and injuriously affected. The result is that in such cases the wrong-doer is subject to dual retribution for the same act: first, punishment by the government for the wrong as a crime, and secondly, an action for damages by the injured individual for the same wrong, as a tort; and judgment against the wrong-doer in either action is no bar to a judgment against him in the other.¹

The civil judicial proceedings to enforce duties and redress wrongs between co-subjects consist mainly of two

¹ 1 Bishop, New Crim. Law, §§ 230-254, 32-35; BL Com., pp 1-7; Add. Torts (Dudley & Baylies' ed.), p. 926.

classes; one class in which the property of the defendant is appropriated in satisfaction of judgments for default in the payment of money obligations, and judgments awarding damages caused by torts; the other class consists of judicial decrees and orders commanding the performance of personal acts which justice and equity demand, or the abstention from acts or things injurious to the complaining party, for which there is no lawful warrant or justification, and for which an ordinary action for damages will not afford adequate relief. The two classes of judgments are often distinguished in the books as money judgments and personal judgments.

Money judgments are satisfied by levy and sale of defendant's non-exempt property, if sufficient for the purpose be found by the officer holding the execution; and in default thereof, by arrest and imprisonment of defendant, where the body is not exempt by law from imprisonment for debt. On failure of thus satisfying the execution, and belief that defendant has fraudulently concealed or disposed of his property, the creditor may have supplementary proceedings for discovery; and if property be found applicable to the execution, it will be taken and sold, and the proceeds applied on the original judgment, and costs, both of the original action and supplemental proceedings. Different states have different judicial methods of effecting a like result, but the underlying principle and animus are the same in all.

Personal judgments, when disobeyed, are enforced by fine and imprisonment, one or both, "as for contempt of court." At this point the proceedings have evolved a conflict between the authority of the court and the will of the recusant defendant; and on the part of the court "there is power."

Equity affords more abundant illustrations than law of

the power and methods of courts in the enforcement of this class of judgments and decrees.¹

Actions and proceedings for reaching and appropriating property in payment of debts, above sketched, in legal terminology, are denominated "proceedings *in personam*." There is another class of judicial proceedings directly affecting property, called "proceedings *in rem*." "A judgment *in rem*," it is said,² "is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject-matter itself whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself, and the judgment is a solemn declaration upon the *status* of the thing, and it *ipso facto* renders it what it declares it to be." Jurisdiction of the court is acquired by seizure or attachment of the property itself in the first instance, no personal service upon, or notice to, any person being requisite for the purpose. It differs in this respect from proceedings *in personam*, in which jurisdiction of the court is obtained by personal service, or a substituted service by publication or otherwise, specially prescribed by law as an equivalent, and the judgment rendered is *inter partes*. The judgment *in personam* is binding only upon the parties served as shown by the record, and their privies; while a judgment *in rem* is conclusive and binding upon all persons interested, strangers as well as parties to the record; "binding," it is often said, "upon all the world," since "all the world are parties to the suit." Although no service of original process, or notice, is necessary to confer jurisdiction upon the court, when seizure

¹ Black on Judgments, §§ 1-4, 722-793, 1107; 2 Story, Eq. Jur., §§ 861-950; Pom. Eq. Jur., §§ 110-112; Willard's Eq. Jur. (Potter's ed.), p. 344 *et seq.*; High on Inj., § 1; Frye, Spec. Perf. (2d Am. ed.), p. 432 *et seq.*

² Wordring v. Taylor, 10 Vt. 65.

or attachment is made, notice is given to all parties interested by public proclamation, or otherwise, in pursuance of statutory provisions or rules of court; and thereupon owners and other claimants may intervene and contest their claims.

Proceedings and decrees *in rem* in courts of admiralty, proceedings and judgments in prize cases, and various other judicial proceedings of a similar character, belong to this class.¹

§ 39. The writ of habeas corpus.—The foregoing general statement of the power and methods of enforcing and vindicating the rights of the subject is so comprehensive in its scope that analytical specifications are unnecessary for the intelligent reader. But the writ of *habeas corpus* is of so much interest historically, and a remedy so simple and effective for illegal restraint of liberty, that it is worthy of special notice in this connection. Writs of *habeas corpus* for various specific purposes were known to early English law; but the great *Writ of Habeas Corpus* was given to the English people, and to all the world where the principles of English liberty and law prevail, by the Act of 31 Charles II., ch. 2. Under the provisions of this act, any subject who is in any manner, or for any alleged cause, restrained of liberty, may petition the proper magistrate alleging such restraint and its illegality, and praying the benefit of *habeas corpus*; whereupon such magistrate *must*, under a prescribed penalty, issue his writ or order, have the prisoner brought before him without unnecessary delay, and institute a

¹ Black, Judg., §§ 792–812; *Mankin v. Chandler*, 2 Brock. 125; Smith, Lead. Cas. 585; *The Globe*, 2 Blatchf. 427; *Averill v. Smith*, 17 Wall. 95; *The Propeller Commerce*, 1 Black (U. S.), 580; *The Mary Ann*, 1 Ware, 104; Bened ct, Ad. Pr., §§ 433, 439, 364, 365, 434.

summary inquiry into the cause of imprisonment. If the restraint be adjudged illegal the prisoner will be set free; otherwise he will be remanded to the custody of the officer or party from whose power he was taken. This summary proceeding affords speedy relief from illegal imprisonment, and the utmost possible safeguard to the liberty of subjects which law can provide.

The remedial privilege of this writ, guaranteed to the English people by their constitution, is the birthright of American citizens, recognized and enforced in all the states of the Union. In some of the states it has been adopted or declared in force by their constitutions; in others by statute; and where not specifically adopted by the written law, it is recognized and enforced by the courts as the law of the land.

The constitution of the United States provides that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."¹

Under this provision of the constitution the important and somewhat perplexing question arises: In what department of the government is the power to suspend the privilege of the writ vested? This question arose for the first time during the civil war of 1861-1865. President Lincoln issued orders for the suspension of the writ in certain localities; and on May 5, 1867, John Merryman, of Baltimore, was arrested, charged with treason, and confined in Fort McHenry, then in command of Gen. Cadwalder. He immediately applied to Chief Jus-

¹ U. S. Const., art. I, § 9, cl. 2; R. S. of U. S. (Bout. ed.), p. 21, and cases cited; 2 Kent, Com. (5th ed.), pp. 26-32, 194; Story, Const., §§ 1338-42; 1 Cooley's Bl. (8d ed.), p. 128 and note 9; Id., pp. 134, 135 and notes 15 and 16; 2 id., pp. 136, 137, and note 13; Cooley, Princip. Const. Law, pp. 128-130, 288-290; Pom. Munic. Law, pp. 363, 378-482, 398-404.

tice Taney for a writ of *habeas corpus*, which was granted and served upon Gen. Cadwalder, who refused to obey it, on the ground that the privilege of the writ had been suspended. The chief justice, not recognizing the authority of the president's action, holding that congress alone was authorized to suspend the privilege of the writ, issued an attachment against Gen. Cadwalder; but the officer holding the mandate was not permitted by the military authorities to serve it. Thus ended this embarrassing episode, leaving the important constitutional question unsettled. Thereupon ensued a spirited controversy as to which department of the government is the depository of the authority to suspend the writ of *habeas corpus*, whether congress or the executive. Distinguished jurists and statesmen participated in the discussion, some on one side and some on the other; but the question has yet to be definitely settled.¹

DUTIES OF SUBJECTS TO THE GOVERNMENT, HOW ENFORCED.

§ 40. **Allegiance.**—Any hostile spirit incompatible with hearty allegiance to the government, or indifference to public duty, is treasonable in its nature, and, when resulting in disobedience, or overt acts hostile to the authority or welfare of the government, is subject to primitive treatment.

Mr. Bishop well says:² “Treason is the heaviest offense known to the law; because, with governments as with individuals, self-preservation is the first duty, taking

¹ Ex parte Merryman, Taney's Decisions; McPherson's History of the Rebellion, 156; 9 Am. Law Reg. (N. S.) 527; McCall v. McDowell, 1 Abb. U. S. R. 712; Ex parte Field, 5 Blatchf. 63; 2 Story, Const., § 1342, and notes; Ex parte Milligan, 4 Wall. 2; 1 Bish. New Crim. Law, §§ 48-68, and n. 1, under § 64, and cases cited.

² 1 Bish. Crim. Law, § 456.

precedence of all others." And further:¹ "It is not the whole duty of a subject to abstain from the overthrow of the government. He should avoid what tends to its overthrow; nor should he weaken it, or bring it into contempt, or obstruct its functions in any of its departments. And he should render to it his active aid whenever occasion demands. Therefore every act or neglect, of what is thus pointed out as duty, is, when sufficient in magnitude, criminal." This doctrine is very broad and comprehensive, clothing the government with plenary power to enforce the allegiance of its subjects.

Treason, in its spirit and scope, includes offenses known to the law as *felonies* and *misdemeanors* of the character above described, every species of which is punishable criminally, whether under the name of treason, or of some different name of an inferior grade. For example, sedition, including libel upon the government; riots and conspiracies; refusal without lawful excuse to accept public office; breach of official duties; and other misdemeanors which tend to weaken the authority of government, and to endanger its stability.²

Down to a comparatively recent date two grades of treason were known to the English law, *high* and *petit* treason. The acts which constituted, or which were construed by the courts to constitute, petit treason were so numerous, multiform and uncertain, and so often depended for construction upon the temper or prejudices of the judges, that the liberties and lives of English subjects became alarmingly insecure. In obedience to popular demand for a change, petit treason was abolished in England by act of Parliament, 9 Geo. IV., ch. 31, § 2.

¹ 1 Bish. New Crim. Law, ch. XXXII, and §§ 607-625; 4 Bl. Com., p. 75 *et seq.*

² 1 Bish. New Crim. Law, § 456; 2 *id.*, § 457.

Petit treason is unknown by that name in the United States. The federal constitution contains the following provision: "Treason against the United States shall consist only in levying war against them, or adherence to enemies, giving them aid or comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."¹

The federal constitution further provides that: "The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."²

§ 41. Obedience.—Little need be said in regard to the power of the government and its methods of enforcing this duty of its subjects. The principles and methods respecting the enforcement of rights and duties, above pointed out, apply to the duty of obedience. The laws of a nation defining and prescribing the duties of its subjects are to them the authoritative voice of the supreme power, "commanding what is right and prohibiting what is wrong." The enforcement of law is enforcement of the duties of the subject, including duties to the government. In every well organized government all its departments and officers are clothed with authority, and provided with the necessary machinery, for enforcing the laws, each within its own sphere and prescribed functions; and to

¹ U. S. Const., art. 3, § 3, cl. 1; *United States v. The Insurgents*, 2 Dall. 335; *United States v. Mitchell*, 5 Dall. 348; *Ex parte Bollman and Swartwout*, 4 Cranch, 75; *United States v. Aaron Burr*, 4 Cranch, 469.

² U. S. Const., art. III, § 3, cl. 2. And see 2 Story, Const., §§ 1796-1801; Cooley, Princip. Const. Law, pp. 287, 288; 4 Bl. Com., pp. 75-203; *Bigelow v. Forest*, 9 Wall. 339; *Day v. Micou*, 18 Wall. 156; *Ex parte Lange*, 18 Wall. 163; *Wallack et al. v. Van Riswick*, 92 U. S. 202.

the support and protection of each in the exercise of its legitimate authority, and the performance of its duties, the whole power of government is pledged.

§ 42. **Support.**—Of the enforcement of duties of subjects to the government there remains to be noticed that of support. For convenience of treatment and study this duty will be considered under four heads, namely: office-bearing, taxation, eminent domain, and military service.¹

1. *Office-bearing.*—Rarely, if ever, at the present day, is there need of compulsion by government to fill all its offices. Quite generally there is no marked unwillingness among ordinary citizens to assume the duties, burdens and responsibilities of public office. Such positions seldom have to go begging for an incumbent. But, as we have seen, refusal to accept public office without lawful excuse is a criminal offense, and punishable as such.² This persuasive to duty is all the compulsion required by the government to fill its offices, should the possible need of external motive power arise.

It should be noticed that this rule of law does not apply to offices which the incumbent is at liberty to resign at pleasure. To such cases the reason of the rule is inapplicable, and therefore the rule itself does not apply: "*cessant ratione legis, cessat ipsa lex.*"

2. *Taxation.*—As shown,³ taxation is of two general classes, *direct* and *indirect*; the latter variously designated by the names of "duties," "imposts," "excises," and "tariffs," the last named being the best known and understood by the people.

Indirect taxes are voluntarily and often unconsciously

¹ See *ante*, § 33.

² 1 Bish. New Crim. Law, §§ 246, 458; *London v. Headon*, 76 N. C. 72.

³ *Ante*, § 33, subd. 2.

paid in the expenditures for food, raiment, and the supply of other personal and social wants incident to civilization. Hence, as it respects this kind of taxation, no compulsory action of government is required to enforce payment.

Direct taxation encounters more difficulties. It is generally disagreeable to the taxpayer, who evades payment by various devices and unwearied persistence. To the masses its necessity and benefits are not well understood, and its methods are mysterious and seemingly arbitrary. This attitude of a large portion of the public towards direct taxation is, doubtless, due in part to the fact that it has been used by arbitrary, unjust governments for the benefit of rulers and favored classes, and to the oppression of the lower ranks of society.

But well organized civil governments having authority to impose taxes for their support must necessarily have, and do have, power to enforce payment. Under a wise and just scheme of taxation the amount assessed to each taxable subject is, theoretically, graduated to the value of his taxable property, sufficient of which for payment may be appropriated by the government by direct levy and sale; or the payment may otherwise be enforced as may the payment of the debts of subjects to their co-subjects.¹

3. *Eminent domain*.—This, as we have seen,² is the power to take private property for public use. The mode of exercising the power, when not otherwise prescribed by the organic law, is within the discretion of the legislature. And if the purpose be a public one, and just compensation be paid or tendered to the owner of the property taken, the power of the legislature is unlimited.³

¹ *Ante*, § 38.

² *Ante*, § 33, subd. 3.

³ *United States v. Jones*, 109 U. S. 518; *Beekman v. Saratoga*, etc.

4. *Police power*.— This, the inherent and important power of organized government, is the safeguard of society, which subordinates the rights and privileges of individual members to the safety and welfare of the whole. Its definition and part in governmental administration, herein already briefly stated,¹ are well expressed in the two familiar maxims, *sic utere tuo ut alienum non lædas*,² and *salus populi suprema lex*.³ Possession of this power by government implies the right and duty of its exercise, and the power to make and enforce all necessary and appropriate laws and regulations for that purpose.

5. *Military service*.— That a thoroughly equipped and well disciplined army and navy is indispensable to the safety of a nation is the clear and uniform testimony of history. So well was this understood by the organizers of the United States government that ample constitutional provisions were made for these national safeguards, as we have seen.⁴

All persons subject to military duty may be required and compelled to perform the duty wherever the government may deem their services necessary for the public safety. Military law is characterized as the law of military necessity in the presence of war; it is then wholly arbitrary, superseding existing civil law. *Inter arma silent leges* is the expressive maxim.

R. Co., 3 Paige, 72; *Charles River Bridge v. Warren Bridge*, 11 Pet. 641; *West River Bridge Co. v. Dix*, 6 How. 531-533; *Secombe v. Milwaukee*, etc. R. Co., 23 Wall. 113; *People v. Smith*, 21 N. Y. 595; *Holt v. Council of Somerville*, 127 Mass. 410, 413.

¹ *Ante*, § 33, subd. 4.

² Brown, *Leg. Max.* (4th ed.), pp. 247-258, star pp. 275-289.

³ *Id.*, pp. 49-54, star pp. 1-8; *And. Law Dic.*, title "Police."

⁴ *Ante*, § 33, subd. 5, and authorities thereunder cited. And see *post*, ch. VII, Military and Martial Law.

CHAPTER IV.

THE WRITTEN LAWS.

- SECTION 43. The written law of England.
- 44. The written law of the United States.
 - 45. The colonies.
 - 46. Declaration of independence, and revolutionary government.
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 - 56. State statutes.
 - 57. By-laws of municipal corporations.
 - 58. Departments and functions of the United States government.
 - 59. English and United States constitutions contrasted.

§ 43. **The written law of England.**—The first general and broadly comprehensive classification of law claiming attention is that of the *written* or *lex scripta*, and the *unwritten* or *lex non scripta*; the latter division being quite generally denominated the *common law*.

In English jurisprudence and legal literature the divisions under consideration are denominated the “*statute law*,” and the “*common law*,” corresponding to *written* and *unwritten*. The use of the term “statute law” in

England, instead of "written law," is said to be due to the fact that the English commonwealth has no written constitution.¹

Says Prof. Cooley:² "The constitution of England may be said to consist of the unwritten rules and usages in accordance with which the powers of government are habitually exercised. By the theory of the British government, the exercise of sovereign power exists in the parliament, which is so far supreme in action that by a strong figure of speech it is sometimes said to be omnipotent. By this it is to be understood that no other human power is placed over or is made superior to it, or that can question that what parliament declares to be law is law. From this theory of its powers it must follow that parliament is superior to the constitution itself and may modify it at pleasure, as indeed has often been done."

Sovereign power in England is practically vested in parliament. "It," says Blackstone, "hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal: this being the place where that absolute despotic power which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown, as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land, as was done in a variety of instances, in the reigns of Henry VIII.

¹ Potter's *Dwarris on Statutes and Constitutions*, pp. 44, 45.

² Cooley's *Bl.*, vol. I, p. 49, n.

and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves, as was done by the act of union and the several statutes of triennial and septennial elections. It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure of speech rather too bold, the omnipotence of parliament."¹

Hardly too bold a figure of speech when applied to the domain and functions of civil government. The same powers centered in one man would clothe him with omnipotence within his territorial domain and give him the title of despot. It would be exceedingly difficult, if not quite impossible, to state the omnipotence of parliament, including its dominance over what is termed the English constitution, in clearer, stronger and more comprehensive language than does Blackstone in the foregoing quotation from his commentaries. Yet it is claimed by eminent jurists and statesmen that there is a constitution in the English governmental system that is superior to, and which dominates, parliament. This view is thus expressed by the late Professor Pomeroy: "To call the British parliament omnipotent is, however, only a figure of speech to illustrate its influence and all-embracing authority. There is to them a constitution, of which they are not the creatures, like the United States congress, but of which they are an integral part, as is the king, as are the nobles and commons, the church and laity, the judiciary, and still more, the general and individual principles which underlie and infuse the whole. This constitution, the growth and product of ages, the accumulation of the experience of centuries, the result of generations of fierce conflict between kings and nobles, between both and

¹ 1 Bl. Com., p. 161.

commons, between power and liberty, is as really binding upon the imperial legislature as are the written regulations of our convention of 1787 upon the federal congress.”¹

This is an attractive picture of the British constitution, and may be true to reality, in *theory*. A constitution, the evolution of progressive centuries; a constitution into whose texture is woven the life of an illustrious nation — should command high admiration and profound veneration. But has England, practically, such a constitution? Has she a supreme law which is above and over all, a dominant power in the state, to which obedience can be enforced? English statesmen and jurists claim that there is in the British realm such a thing, or body of law and principles, which is supreme, and which constitutes the governing power. Yet, as we have seen, one of the departments of government, theoretically subordinate to the unwritten constitution, namely, the parliament, has repeatedly disregarded or overridden the authority of that constitution, even to the extent of radically changing its theoretical structure and prominent provisions; and no organized power existed to restrain, redress or punish its gross infraction of the supreme law of the realm. What is a constitution worth that may be violated at pleasure with impunity by any branch of the government?

It is true that the sovereign is a constituent part of the British parliament, the description of which body is “The King, Lords, and Commons.” And, in theory, the crown has a veto power, but it would seem that it now exists only in theory. Of the veto, Professor Pomeroy says: “In practice, the United States president seldom resorts to the veto, the British crown never.”² This state-

¹ Pom. Munic. Law (2d ed.), § 71. ² Pom. Munic. Law (2d ed.), p. 39.

ment is not, however, strictly correct; in the whole history of legislation by parliament the veto power has been exercised three times, and three times only, by the crown; the last time by Queen Anne in 1707.¹ It is nevertheless true that the veto power by the crown, at present, exists only in name. The three constituents of parliament—king, lords, and commons—institute, theoretically, a system of “checks and balances,” which English jurists and statesmen regard as the perfection of governmental organism.² Blackstone says of it: “Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but, at the same time, in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community.”³

This ideal of equilibrium is rudely disturbed by Professor Cooley, who says of it: “That little is left of this theoretical equilibrium of powers is made apparent whenever a decided difference in opinion is found to exist between the crown or the lords, or both, on one side, and the commons on the other, on any subject of great public interest; such, for example, as that of the reform bill of 1832, or the Irish church disestablishment bill of 1869, or the Irish land bill, 1881. Invariably, if the commons insist, the crown and the lords must yield. It is now an inflexible principle that the ministry must have the confidence of the controlling majority in the commons; and when this confidence is lost, it must make way for others, unless the crown shall permit a dissolution of the parliament in order to gather the opinion of the people in a

¹ Cooley's Bl., vol. I, p. 184, n.

² 1 Bl. Com., p. 154 *et seq.*

³ 1 Bl. Com., p. 155.

new election. The veto power is now practically obsolete.”¹

In theory it is the king's prerogative to convoke and dissolve parliament. Yet this prerogative of the king has been ignored, at times, in the history of parliament, that body having assembled and exercised its ordinary functions without call or sanction by the crown; as the parliament which restored King Charles the second; the revolution, A. D. 1868, when the lords and commons, by their own authority, and upon the summons of the Prince of Orange, assembled and disposed of the crown and kingdom.² In explanation of these violations of the constitution it is said that they were exceptional and the result of necessity; but nevertheless they tend to show that an unwritten constitution is unreliable as a fundamental law of government; one thing to-day, and something else, or nothing, to-morrow, according to circumstances; that whatever may be its ideal, structure and qualities, it is not supreme and controlling in national exigencies, and furnishes no sure protection to the rights of the minority against an unscrupulous and determined majority.

Touching the vast and indefinite power of parliament, Blackstone says: “The privileges of parliament are very large and indefinite. And, therefore, when in 31 Henry VI. the house of lords propounded a question to the judges concerning them, the chief justice, Sir John Fortescue, in the name of his brethren, declared that they ought not to make answer to that question; for it hath not been used aforetime that the justices should in any way determine the privileges of the high court of parliament. For it is so high and mighty in its nature that it may make law;

¹ Cooley's Bl., vol. I (3d ed.), p. 155, n.

² See Cooley's Bl. (3d ed.), p. 159; P. & M. Munic. Law (2d ed.), §§ 71, 72.

and that which is law, it may make no law; and the determination and knowledge of that principle belongs to the lords of parliament and not to the justices.”¹

On even a cursory view of the English unwritten constitution it is quite apparent that no power exists in the government to control parliament, or to redress violations of the fundamental law; that revolution is the only effectual remedy for infractions of the constitution; and the only security for the rights and liberties of British subjects.

Brief comment has been made upon the English *unwritten* constitution for the purpose of contrasting it with a *written* organic law, such as the constitution of the United States, a brief outline of which is hereinafter presented.

It should, however, be noticed in passing that not only are all acts of parliament embraced in “the written law” of England, but also by-laws of municipal and some other corporations, which artificial bodies have authority to make by-laws or private statutes for their own government, “not contrary to the law of the land.”² And royal proclamations, within the prerogative of the crown, may properly be assigned to the same class of laws.³

§ 44. The written law of the United States.—A brief view of our governmental structure and system is requisite to a clear and full understanding of the several classes of written laws, under the government of the United States.

“*E pluribus unum*,” the motto of the United States, aptly expresses its true character. It is composed of the

¹ Seld. Baronage, part 1, ch. 4; 1 Bl. Com., p. 164.

² 1 Bl. Com., pp. 475, 476.

³ 1 Bl. Com., p. 470.

federal or general government and a growing family of state governments, each independent and sovereign in its prescribed sphere, and all parts of one system, of which the federal constitution is the organic and dominant center. This peculiarity of our governmental system was the logical outgrowth of our antecedent national history — the culmination of an evolutionary process.

§ 45. The colonies.—In a cursory view of the progressive steps which led to the formation of our present government, we begin with the colonies. Succeeding to, or in usurpation of, the title and occupancy of the aborigines, subjects of Great Britain, in separate colonies, and under various patents from the crown, had taken possession of the country. Each colony claimed title to the soil, and governmental authority, within its own prescribed limits, subject only to the suzerainty of Great Britain. The colonies had no direct political connection with each other, and had separate, and, in some respects, conflicting interests as between themselves; yet they were united by the ties of a common interest as against the injustice and oppression of the mother country, the government of Great Britain. The latter interests ultimately unified the colonists in a firm resolve to throw off the British yoke, and secure national independence.

§ 46. Declaration of independence, and revolutionary government.—The colonists, with long suffering, and earnest efforts, had striven to obtain from the crown that measure of favorable consideration and just treatment to which, as faithful subjects, they were entitled, and without which their condition was intolerable; but all their efforts proved unavailing. Finally, when forbearance ceased to be a virtue, and further temporizing

might be attributed to cowardice by the onlooking world, they formulated, uttered and published that immortal proclamation, the Declaration of Independence.

For about two years following, the colonies had no other common bond of union than the necessities of their condition, and the continental congress, in which each colony or state was represented. But the government thus improvised was revolutionary in character, and ineffective for its purposes. The congress might pass resolutions and enact laws, but lacked power to enforce them. Their force and sanction depended wholly upon the common consent and acquiescence of the several independent states.¹

§ 47. **Articles of confederation.**—The revolutionary government proving inadequate to the exigency of the colonists, an advance step was taken in the articles of confederation.² By these articles the states delegated to the United States in congress assembled certain powers “for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon, them, or either of them, on account of religion, sovereignty, trade, or any other pretense whatever;”³ and that, for the more convenient management of the general interests of the United States, delegates from the several states should meet in a congress in which each should have an equal vote.

The articles further prescribed the granted powers and

¹ Curtis' Hist. U. S., vol. X, ch. 11; Story, Const., § 177 *et seq.*, and § 198 *et seq.*; Cooley, Const. Law, p. 10.

² Boutwell's ed. R. S. of U. S. 1878, n. p. 7; Curtis' Hist. U. S., ch. 5; Story, Const., chs. II and III; Cooley, Const. Law, p. 11.

³ R. S. U. S. (Bout. ed.), p. 7, and citations; Story, Const., § 218 *et seq.* and § 229 *et seq.*

limitations of power of the United States, and also the reserved powers and limitations of power of the several states; thus essaying the difficult achievement of framing a complex governmental system by a voluntary union of independent states, constituting a federal government with specific and limited powers, embracing and dominating all the constituent states, each of which to remain sovereign and independent within its prescribed sphere, with a constitution and government of its own.¹

§ 48. **Failure of the articles of confederation.**— However promising this scheme may have appeared to the statesmen of that critical transition period of American independence, in the light of subsequent history it is not at all surprising that the articles of confederation signally failed to accomplish the purpose for which they were framed and adopted.²

The plan and scope of this work will not admit of a detailed discussion of the defects in the confederate governmental structure; these defects are elaborately treated by able writers on American history, to whose works the reader is referred.² Summarized, the fatal defects inherent in the confederate organism, and developed in its workings, consisted of two classes: first, its inability to enforce the resolutions and decrees of its congress; and, secondly, the separate interests of the constituent states, having full play, neutralized the action of the federal government in the exercise of its nominal power and prescribed functions. Touching these defects a leading writer of that day used the following strong language:³ “By this political compact the United States in congress

¹ Citations last *supra*.

² Story, Const., ch. 4; Pitkin, Hist. of U. S., ch. 17; Curtis, Hist. of the Const., book 2; Von Holst, Const., ch. 1; and others.

³ 1 American Museum, 1786, p. 270; Story, Const., § 246.

have exclusive power for the following purposes without being able to execute one of them. They may make and conclude treaties, but can only recommend the observance of them. They may appoint ambassadors, but cannot defray even the expenses of their tables. They may borrow money in their own name on the faith of the Union, but cannot pay a dollar. They may coin money, but they cannot purchase an ounce of bullion. They may make war and determine what number of troops are necessary, but cannot raise a single soldier. *In short, they may declare everything, but do nothing.*" Of this characterization Judge Story says: "Strong as this language may seem, it has no coloring beyond what the naked truth would justify."¹ And Washington said: "In a word, the confederation appears to me to be little more than a shadow without the substance; and congress a nugatory body, their ordinances being little attended to."²

§ 49. The federal constitution.—The next and crowning step in the evolutionary process taken by the colonists was the construction and adoption of the federal constitution under which the country now lives and prospers.

In February, 1787, the congress recommended a convention of delegates from the several states "for the purpose of revising the articles of confederation, and reporting to congress and the several legislatures such alterations and provisions therein as shall, when agreed to in congress and confirmed by the states, under the federal constitution, be adequate to the exigencies of government and the preservation of the Union."³ In pursuance of

¹ Story, Const., § 247.

² 5 Marshall's Life of Washington, 64.

³ 2 Pitkin's Hist. 220, 221; 5 Marsh. Life of Wash. 124, 125; Journal of Congress, 12, 13, 14.

this recommendation of congress, the convention assembled and entered upon the work assigned it; but, on mature deliberation, found it wholly impracticable to effect the purpose in view with the articles of confederation as a basis.

To meet the exigency, the convention framed and recommended a new constitution essentially different from the articles of confederation, which new constitution, on ratification by conventions of nine states, should become established between the states so ratifying the same.

On the first Wednesday in March, 1789, all the states except North Carolina and Rhode Island having ratified the proposed constitution, it went into operation, and, with some amendments, has since remained the constitution of the United States.¹ The excepted states subsequently assented to this radical change in the organic law and became members of the Union, the former in November, 1789, and the latter in May, 1790. Vermont, having ratified the new constitution, was admitted into the Union by act of congress approved February 19, 1791.

§ 50. Difference between the articles of confederation and the constitution of the United States.—While the constitution of the United States contains some of the features of the articles of confederation, there is a radical difference between the two governments which should not be overlooked. The latter was a confederation of independent states, united by compact for certain specific purposes, each sovereign in itself except in the particulars in which its sovereignty yielded, theoretically, to the general government for the common good. *The states were the constituents of the confederate govern-*

¹Owens v. Speed, 5 Wheat. 420; 2 R. S. of U. S. (Bout. ed.), p. 17, note; Story, Const., book III, ch. 1; Cooley, Const. Law, p. 16.

ment; whereas, the *people of the United States*, and not the *states, in their independent corporate capacity*, are the constituents of the general government.

The distinction between the two governments is clearly indicated by their respective preambles. That of the articles of confederation runs thus: "Articles of confederation and perpetual union between the states of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia."¹

The preamble of the constitution of the United States is as follows: "We, the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this *Constitution* for the United States of America."²

The doctrine that the government organized by this constitution was a mere compact of independent states, a *quasi*-copartnership, from which any member might withdraw at pleasure, which gained currency in some parts of the country, bore costly and bitter fruit. It led to an attempted division of the Union by the secession of states, and the formation of a separate government, popularly known as the "Southern Confederacy." But, fortunately for the entire republic, this revolutionary

¹ R. S. of the U. S. (Bout. ed.), p. 7.

² So capitalized in the original. R. S. U. S. (Bout. ed.), p. 17; and see *McCulloch v. State of Maryland*, 4 Wheat. 316; *Barrow v. The Mayor, etc. of Baltimore*, 7 Pet. 243; *Owings v. Speed*, 5 Wheat. 420; *Dodge v. Woolsey*, 18 How. 347; *Warren Manufacturing Co. v. Etna Ins. Co.*, 2 Pa. 501; *Cohens v. Virginia*, 6 Wheat. 413, 414; *Texas v. White*, 6 Wall. 700.

scheme was thwarted. Love of the Union, and the stern arbitrament of war, averted the threatened catastrophe, and effectually crushed out the fatal political heresy. The supreme court of the United States has judicially declared that, "The government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit."¹

"The constitution is supreme over all the departments of the government, and anything that may be done, unauthorized by it, is unlawful. It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it."² "The union of the states is indissoluble by the act of any portion of them; notwithstanding the ordinance of secession passed by the state of Texas, her obligations as a member of the Union remained perfect and unimpaired."³

Other judicial authority, and the opinions of distinguished statesmen, might be cited to the same effect, but more will be superfluous.

§ 51. Kinds and order of precedence of the written laws of the United States.— A clear, accurate, succinct and logical analysis of the "different sorts of the written laws of the United States, and their order of precedence," has been furnished by Mr. Bishop in his valuable work on the subject.⁴ In other works, notably that of Judge Story, more elaborate analyses may be found;

¹ McCulloch v. Maryland, 4 Wheat. 316.

² Dodge v. Woolsey, 18 How. 331.

³ Texas v. White, 7 Wall. 700.

⁴ Bishop on the Written Laws, § 11 *et seq.*

but none better suited to the present work than that of Mr. Bishop, to whom the writer freely acknowledges himself largely indebted for the following discussion of the subject.

After stating the rule that the *unwritten* law gives place to the *written*, Mr. Bishop gives the order of the written as follows: I. "The Constitution of the United States; II. Treaties; III. Acts of Congress; IV. The Constitutions of the Several States; V. State Statutes; VI. By-laws of Municipal Corporations."

§ 52. **Constitution of the United States.**—This instrument is a *law*, the organic law of the United States; not only the first of our written laws in the order of precedence as above named, but first in authority and importance, being by its own provision, and by repeated adjudications of the federal courts, *supreme* within its own sphere. "All laws, in whatever form, or from whatever source proceeding, contrary to it are void."¹

§ 53. **Treaties.**—The constitution of the United States provides in terms, that "all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."² This provision is in harmony with the law of nations, by

¹ Const. of U. S., art. 6; Bishop, Written Laws, § 12; Pacific Railroad v. Maguire, 20 Wall. 86; Dodge v. Woolsey, 18 How. (U. S.), 331, 347; Van Horne v. Dorrance, 2 Dall. 304, 308; Calder v. Bull, 3 Dall. 386, 399; Dartmouth College v. Woodward, 4 Wheat. 518, 625; Livingston v. Moore, 7 Pet. 469; Craig v. Missouri, 4 Pet. 410; Green v. Biddle, 8 Wheat. 1.

² Const. U. S., art. 6; R. S. of U. S. (Bout. ed.), p. 27, and authorities there cited; Bishop, Written Laws, § 13 *et seq.*

which a treaty is a mutual pledge of faith between sovereign powers.¹

The constitution provides for the enforcement of this provision by extending the judicial power of the United States to "treaties made, or which shall be made," under its authority.² The constitutional provision inhibiting the states from entering into treaties further secures their supremacy.³ From this inhibition it follows that a valid treaty is superior to state constitutions and statutes; and so the courts have adjudged.⁴

There is a difference between a treaty and a statute in respect to exposition and enforcement which should not be overlooked in passing. It is the province and duty of the courts to expound and enforce statutes; but in the case of treaties the power of the courts in this respect is limited and subordinate. Ordinarily foreign nations alleging violations of treaties with the United States appeal directly to the executive department of the government for redress, which has jurisdiction in the premises to the exclusion of the judiciary. So also the war power, in its plenary authority, may disregard the provisions of a treaty, thus subordinating to its action the power of the courts, which, in such case, must follow and cannot lead. But in the absence of action by the treaty-making or the war power, the exposition and enforcement of treaties is the province of the courts.⁵

¹ Bishop, *Written Laws*, § 12; Story, *Const.*, § 1838; Vattel, *Law of Nations*, b. 2, ch. 12; *The Federalist*, No. 64.

² *Const. U. S.*, art. 3, § 2; *R. S. of U. S.* (Bout. ed.), p. 24, and cases there cited; Bishop, *Written Laws*, § 13.

³ *Const. U. S.*, art. 1, § 10; *R. S. of U. S.* (Bout. ed.), pp. 21, 22, and cases there cited.

⁴ *Ware v. Hilton*, 3 Wall. 199; *Baker v. Portland*, 5 Saw. 566; *Gordon v. Kerr*, 1 Wash. C. C. 322; *Fellows v. Blacksmith*, 19 How. (U. S.) 366; *Orr v. Hodgson*, 4 Wheat. 453.

⁵ Bishop's *Written Laws*, § 13a, § 14, with notes and cases there.

§ 54. **Acts of congress.**—The constitution of the United States contains the following provision: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, in pursuance thereof, under the authority of the United States, shall be the supreme law of the land; and judges in every state shall be bound thereby, anything in the constitution or laws of any states to the contrary notwithstanding."¹ By this provision, it will be seen that acts of congress and treaties are classed with the constitution in supreme authority, to which all state laws, written or unwritten, are subordinated.

§ 55. **Constitutions of the several states.**—Subject to the supreme authority of the constitution of the United States, treaties and acts of congress made and passed in pursuance thereof, the constitution of each state is the supreme law within its territorial limits, to whose authority all conflicting statutes and laws must yield.²

§ 56. **State statutes.**—Next in rank and order of authority are state statutes. Subject to the supreme laws above mentioned, an act of the state legislature is the supreme law of the state, superior to the unwritten law.³

cited touching treaties requiring legislation; Cooley, Const. Law, p. 31 *et seq.*

¹ Const. U. S., art. 6, cited also under § 23; R. S. of U. S. (Bout. ed.), p. 27, and cases there cited.

² Loftus v. Watson, 32 Ark. 414; Sovereign v. State, 7 Neb. 409; In re Goode, 3 Mo. App. 227; Indiana v. Agricultural Society, 4 Norris (Pa.), 357; Frye v. Partridge, 82 Ill. 267; Haley v. Philadelphia, 18 Smith (Pa.), 45; Potter's Dwarrior on Stat. and Consts., p. 346.

³ Bishop, Written Laws, § 17; Potter's Dwarrior, p. 356 *et seq.*; Field v. Des Moines, 39 Iowa, 575.

§ 57. **By-laws of municipal corporations.**— A corporation is briefly defined by Chief Justice Marshall in these words: "An artificial being, invisible, intangible, and existing only in contemplation of law."¹ Blackstone attributes to corporations power "to make by-laws or private statutes for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land, and then they are void. This is also included by law in the very act of incorporation; for, as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic."²

"Municipal corporations," says Judge Dillon, "are bodies corporate" . . . "established by law, to share in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated."³ By-laws of corporations, being as defined, "rules and ordinances by a corporation for its own government;" "a regulation which itself has established for the government of its own internal affairs," it follows that a municipal by-law is a by-law or statute of a municipal corporation.⁴

These by-laws may be controlled by statutes, national or state, and by the unwritten laws, yielding when in conflict with either.⁵

¹ *Dartmouth College v. Woodward*, 4 Wheat. 636. And see *United States Bank v. Devereaux*, 5 Cranch, 88; *Bank of Augusta v. Earle*, 13 Pet. 587.

² 1 Bl. Com. 476.

³ 1 Dill. Munic. Corp. (2d ed.), p. 92, § 9b.

⁴ Bishop, *Written Laws*, § 18; Bouv. Law Dic., title "By-Laws;" *Hopkins v. Swansea*, 4 M. & M. 621, 641; *State v. Williams*, 11 S. C. 283.

⁵ Bishop, *Written Laws*, § 18; *Field v. Des Moines*, 39 Iowa, 575; *State v. Curtis*, 9 Nev. 325; *Thomas v. Richmond*, 12 Wall. 349;

It is not within the scope of this work to analyze statutes and discuss the rules and principles governing their enactment, validity, interpretation, etc. This service has been well performed by able writers in works devoted exclusively to the subject. Without disparagement to the labors of other learned authors who have discussed the subject, may be mentioned "Bishop on the Written Laws," a work singularly clear, concise and logical, yet sufficiently comprehensive, containing *multum in parvo*.

§ 58. Departments and functions of the United States government.— We have seen¹ that the government of the United States was ordained and established by the people; that it is complex in its structure, embracing the federal or general government and the state governments, yet constituting a united, harmonious system, with powers and limitations of power, and privileges, clearly defined in the written organic law. The people, in the exercise of their original, inherent and sovereign power, successfully accomplished the delicate and difficult task of constructing such a government by granting certain enumerated powers and privileges to the federal government in supremacy, and reserving for themselves and the several states all governmental powers and privileges not thus granted.²

Lisbon v. Clark, 18 N. H. 234; *Canton v. Nist*, 9 Ohio St. 439; *Thompson v. Mt. Vernon*, 11 Ohio St. 688; *State v. Crummev*, 17 Minn. 72; *State v. Lindsay*, 34 Ark. 372.

¹ *Ante*, §§ 43, 44.

² *Cooley*, Const. Law, pp. 29, 32, 35; *Bishop*, Written Laws, § 33; 1 *Story*, Const. (4th ed.), p. 196; *Pom. Munic. Law*, § 72; *Webster's Speeches* (1830), p. 431; U. S. Const. (Amendments), arts. IX and X; *McCulloch v. Maryland*, 4 Wheat. 316; *Cohen v. Virginia*, 6 Wheat. 264, 413, 414; *Calder v. Bull*, 3 Dall. 386; *Golden v. Prince*, 3 Wash. C. C. 313; *Slaughter-House Cases*, 16 Wall. 36; *United States v. Cruikshanks*, 92 U. S. 542.

The federal government consists of three departments—the legislative, executive, and judicial.

The legislative department is composed of the senate and house of representatives, constituting congress.¹ These bodies, in conjunction with the president in his limited function of approving or disapproving the enactments of congress, constitute the law-making power of the federal government.² The veto power vested in the president is in its nature legislative rather than executive, and hence a branch of the legislative department. Acts of congress within the powers conferred by the constitution, and passed in due form of law, are superior in authority to state constitutions and laws, written or unwritten. But a statute in excess of constitutional power, or in conflict with the organic law, is absolutely void.³

The executive department is thus created by the constitution: "The executive power shall be vested in a president of the United States."⁴ His powers and duties are prescribed in the same article. While within the bounds of his prescribed constitutional duties and prerogatives he is independent, and not amenable to judicial process; but if he exceed his constitutional authority, or usurp the functions of other departments of the government, his acts in such excess or usurpation, being *ultra vires*, are void. Having no authority in the premises he can confer none, and his acts and warrants will protect no one, not even his officers, and agents who act in strict

¹ Const. U. S., art. I, sec. 1; Cooley, Const. Law, p. 54 *et seq.*; 1 Story, Const., ch. 8; Bishop, Written Laws, §§ 33, 36.

² U. S. Const., art. I, § 7; Cooley, Const. Law, pp. 50, 105, 159; 1 Story, Const., §§ 881-891; 1 Kent, Com., p. 239 *et seq.*

³ 1 Kent, Com., p. 448 *et seq.*; Bishop, Written Laws, § 33; 2 Story, Const., ch. 38; *Cohen v. Virginia*, 6 Wheat. 386-390; *Marbury v. Madison*, 1 Cranch, 137; *State v. Fleming*, 7 Humph. 152.

⁴ U. S. Const., art. 2, sec. 1; R. S. of U. S. (Bout. ed.), p. 23.

obedience to his commands. The executive, on the other hand, has no authority "to pass upon the validity of either legislative or judicial action," except as above stated; and "he is equally concluded by the judgment of a competent court."¹

The judicial department is constituted, and its powers and functions defined, by the constitution.² Among other powers of the judiciary, not the least important is that of adjudging void acts of congress which transcend its power conferred by, or which are repugnant to, the constitution of the United States.³ The power of the federal judiciary in this regard extends, also, to state constitutions and laws which conflict with the federal constitution, or its laws or treaties.⁴

There is one important difference between the constitution of the United States and its powers, and the state constitutions, which is thus expressed by Mr. Bishop:⁵ "The constitution of the United States consists chiefly in a grant of enumerated powers; hence, in interpreting it, the courts presume the existence of no power not expressly or impliedly conferred. On the other hand, a state constitution proceeds on the idea that all legislative functions are in the legislature; therefore in its inter-

¹ Cooley's Const. Law, p. 157; Mulligan v. Hovey, 3 Biss. 13; Kendall v. United States, 12 Pet. 524; Little v. Burreme, 2 Cranch, 170.

² U. S. Const., art. 3; R. S. of U. S. (Bout. ed.), pp. 24-26, and cases there cited.

³ Cooley, Const. Law, p. 144 *et seq.*; 2 Story, Const., § 1576 and notes; Bishop, Written Laws, § 35 *et seq.*; Ex parte Blanchard, 9 Nev. 101; Barnett v. Woods, 5 Jones Eq. 428, 434.

⁴ Cooley, Const. Law, p. 31 *et seq.*; Ware v. Hylton, 3 Dall. 199; Dodge v. Woolsey, 18 How. 331; Jefferson Branch Bank v. Skelly, 1 Black, 436; Cummings v. Missouri, 4 Wall. 277; Railroad Co. v. McClure, 10 Wall. 511; White v. Hart, 13 Wall. 646; Gunn v. Barry, 15 Wall. 610; Pacific R. Co. v. Maguire, 20 Wall. 36.

⁵ Bishop, Written Laws, § 92.

pretation, the powers not taken away by the United States constitution are presumed, except as expressly or by implication denied."

As the federal constitution is supreme in its sphere, embracing all powers granted by the people to the United States, so is a state constitution supreme within its territorial limits in all governmental powers and matters not granted to the United States by the people, or taken from its jurisdiction by the inhibitions of the United States constitution.¹

§ 59. English and United States constitutions contrasted.—The *unwritten* English constitution, and the *written* United States constitution, while theoretically alike in their main features, are practically quite different. In the English governmental scheme, like that of the United States, there are three departments—legislative, executive, and judicial. These create the system of "checks and balances" so highly lauded by Blackstone and other English jurists and statesmen; but which, as we have seen,² exist only in theory.

Parliament is practically omnipotent, there being no power in other departments to control it or to pronounce authoritatively its acts unconstitutional, and none to restrain or redress legislative wrongs.³ Contrasting the United States government with the English, we have seen⁴ that in the former, under a written constitution, the three departments constitute in fact and operative effi-

¹ Bishop, Written Laws, § 16; Frye v. Partridge, 82 Ill. 267; Loftin v. Watson, 32 Ark. 414; In re Goode, 3 Mo. Ap. 226; Indiana v. Agricultural Society, 4 Norris (Pa.), 357; Pierce v. Pierce, 46 Ind. 86; Haley v. Philadelphia, 18 Smith (Pa.), 45; Sovereign v. State, 7 Neb. 409.

² *Ante*, § 37.

³ Cooley's Bl. (3d ed.), p. 49, n.

⁴ *Ante*, § 52.

ciency a system of real "checks and balances," and thus realize the benefits of such an ideal government. No department has the power of permanently usurping the prerogatives of another department, each being kept within its prescribed limits by constitutional provisions. The action of the legislative department, as we have seen,¹ when in conflict with the constitution, may be annulled by the judicial. The power of the executive for evil is limited in a large measure by the legislative control over his jurisdiction, as "much of executive authority comes, not from the constitution, but from statutes, and what is thus given may at any time be taken away."² A further guard against serious offenses, criminal or political, abuse or betrayal of trust by the president, is found in his liability to impeachment and removal from office.³ The power of the judiciary is also measurably limited by legislative control of its jurisdiction.⁴

In marked contrast to the organic law of the United States, thus briefly noticed, is the English doctrine that "the king can do no wrong;" and that he "is not only incapable of *doing* wrong, but even of *thinking* wrong." Any infractions of the constitution, or other wrong, committed by the king, are chargeable to his advisers, who are liable to impeachment, while his royal majesty goes free,⁵ protected by —

"The right divine of kings to govern wrong."

¹ *Ante*, § 52.

² Cooley, Const. Law, p. 158.

³ U. S. Const., art. I, sec. 2, cl. 5; sec. 3, cl. 6; art. II, sec. 2, cl. 5; R. S. U. S. (2d ed., Bout.), pp. 17, 18, 23, and cases there cited; Cooley, Const. Law, pp. 158, 159, and authorities there cited; 1 Story, Const., §§ 777, 786-813; 1 Kent, Com., p. 288.

⁴ Cooley, Const. Law, p. 158, and authorities there cited.

⁵ 1 Cooley's Bl. (3d ed.), p. 245, and n.

CHAPTER V.

THE UNWRITTEN OR COMMON LAW.

SECTION 60. Its nature, genius and scope.

61. Use or custom not ripened into law.

62. Common law of the United States.

63. Composite character of our common law.

64. The federal government and common law.

§ 60. **Its nature, genius and scope.**—The unwritten or common law, in distinction from the written or statute law, is the embodiment of principles and rules inspired by natural reason, an innate sense of justice, and the dictates of conscience; and voluntarily adopted among men for their government in social relations. When these principles and rules become fully established in a community as customs, they are recognized and enforced by judicial tribunals as law, and thereupon become elements in state and national jurisprudence.

The origin, character and scope of the common law have been learnedly discussed by distinguished jurists, from whose writings and judicial *dicta* the following quotations will furnish a valuable exposition and commentary.

Chancellor Kent says: “The common law includes those principles, usages and rules of action, applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.”¹

¹ 1 Kent, Com., p. 470.

Blackstone writes:¹ “The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also *the particular customs*, of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions.

“When I call these parts of our laws *leges non scriptæ*, I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic Druids committed all their laws as well as learning to memory; and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges sola memoria et usus retinebant*. But with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial proceedings, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptæ*, because their original institution and authority are not set down in writing as acts of parliament are, but they receive their binding power and force of laws by long and immemorial usage, and by their universal reception throughout the kingdom.” . . . “These, in short, are the laws which gave rise and origin to that collection of maxims and customs which is now known by the name of the common law; a name either given to it in contradistinction to

¹ 1 Bl. Com., p. 64.

other laws, as the statute law, the civil law, the law merchant, and the like; or, more probably, as a law common to all the realm, the *jus commune*, or *folc-right*, mentioned by King Edward the elder, after the abolition of the several provincial customs and particular laws before mentioned." . . . "Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom."¹

Swayne, J., tersely defines the common law as "Reason dealing by the light of experience with human affairs."²

Says Lowrie, C. J., of Pennsylvania: "Common law grows out of the general customs of the country, and consists of definitions of them and of those ancillary principles that naturally accompany them, or are deduced from them. The common law of our country or century is not necessarily the common law of another, because customs change. It is a sort of law created by the people themselves. When the judges declare it they merely discover and declare what they find existing in the life of the people as a rule of their relations. When the custom ceases, the law ceases. It is this law that people emigrating take with them — by tacit adoption, as far as is consistent with their new circumstances."³

Common law has also been defined thus: "A system of elementary principles and of general juridical truths,

¹ 1 Bl. Com., p. 67; 1 Cooley's Bl., p. 67, n.

² Dickerson v. Colgrove, 100 U. S. 584.

³ Effinger v. Lewis, 32 Pa. St. 369.

which are continually expanding with the progress of society.”¹

§ 61. Usage or custom ripened into law.—We have been considering custom as a source and constituent of the common law; of customs so old, widely known and adopted in a community or state, as to be known and judicially recognized and enforced by the courts as law. There are usages or customs, not ripened into law in the sense just stated, which will be briefly noticed in this connection.

The terms “custom” and “usage” are often used interchangeably in our books; but this is not strictly accurate; a usage may exist which is not a custom judicially recognized as law by the courts; a local usage, or a usage confined to a particular class of persons, or kind of business; not a general and uniform custom established as law. Usage, custom, law, is the order of evolution or gradation; usage makes custom, and custom makes law.

It often occurs in judicial proceedings that usage, under the name of custom, is relied upon by one of the parties litigant, in support of his case. Being a usage or custom which has not ripened into law, its existence must be proved by the party setting it up, and its validity passed upon by the court. This presents the question: What are the requisites of a valid custom? The question may be briefly and comprehensively answered as follows: 1. Age, as we have seen,² is an important element of a valid custom; though not always necessary that its life should extend backwards to a “time whereof the memory of man runneth not to the contrary;” especially when the alleged custom is local, or limited to a particular class of persons,

¹ *Price v. Proprietors of Swan Point Cemetery*, 10 R. I. 240.

² *Ante*, § 54.

or kind of business. 2. It must appear that its existence was known to the other party, either by direct evidence, or by implication from its public, general and uniform observance. 3. It must be universal and uniform within the limits of its applicability. 4. It must be in harmony with the letter, spirit and policy of the law. 5. It must be reasonable. 6. It must not be contrary to justice, religion or morality.

Usage or custom is especially important in the construction of contracts. The established rule is, that if a usage or custom exist where a contract is made, applicable to its subject-matter, such usage or custom enters into and becomes a part of the contract by implication. This, in case the usage or custom be known to both parties in fact, or be of so long standing, and so general and uniform, as to charge the parties presumptively with knowledge of its existence and character; in which case it will be presumed that they contracted in reference to it. Custom, however, will not permit to contradict or vary the express and unambiguous terms of the contract, but will explain what is doubtful, and supply what is lacking in expression to reveal the intention of the parties.

Custom is also invoked to explain words, terms, abbreviations, and signs which, without proof, would be unintelligible to the court and jury.

§ 62. Common law of the United States.—A large portion of the common law of the United States was an

¹ Bishop, Cont., § 444 *et seq.*; 2 Parsons, Cont. (7th ed.), bottom p. 671 *et seq.*; And. Law Dic., title "Custom;" Best's Princip. of Ev. (Chamberlayne's Am. ed.), p. 232 *et seq.*; 1 Greenleaf's Ev. (4th ed.), pp. 128-139; 4 id., p. 248 *et seq.*; Walls v. Barley, 49 N. Y. 464; The Reeside, 2 Sumn. 569; Collings v. Hope, 5 Wash. 150; Rapp v. Palmer. 3 Watts (Pa.), 178; Walker v. Barron, 6 Minn. 508; Hill v. Portland, etc. R. Co., 55 Me. 438; Holmes v. Johnson, 42 Pa. St. 159; Cadwell v. Meek, 17 Ill. 220.

inheritance from Great Britain. Chancellor Kent, speaking of the common law, says:¹ "It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine, that English statutes, passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common laws of this country." This view is ably discussed and fully sustained by Judge Story in his *Commentary on the Constitution*. Among other things² he says: "The universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it that was applicable to their situation. The whole structure of our jurisprudence stands upon the original foundation of the common law." Judge Cooley writes to the same effect.³

But a few men of prominence in the early history of our national life differed from this now universally received doctrine; conspicuously among whom was Thomas Jefferson, third president of the United States, who wrote: "This *narrow notion* was a *favorite* in the first moment of rallying to our rights against Great Britain. But it was that of men who felt their rights before they had thought of their explanation. The truth is, that we brought with us the rights of men, of expatriated men. On our arrival here the question would at once arise, by what law will we be governed? The resolution *seems* to have been, by that system with which we are familiar; to be altered

¹ Kent, Com., p. 473.

² Vol. 1, B. I, ch. XVI, § 157.

³ Cooley, Const. Law, p. 8.

by ourselves occasionally, and adapted to our situation.”¹ There is very little, if any difference, practically, between the prevalent view and that of Jefferson. If the colonists did in fact adopt the common law of the mother country for their government in civil affairs, it is wholly immaterial, practically, on what ground they based their action; whether they claimed and treated it as their own by inheritance, or formally adopted it as an initial code. It is agreed on all hands that the English common law became the unwritten law of the colonies so far as applicable to their circumstances; and that it was expounded and enforced by their judicial tribunals; and, further, that it is the basis of the common law of the states of our Union, with the exception of Louisiana and Texas, in which the Roman or civil law prevails to a greater or less extent.

But the historical fact is that the colonists did formally claim the English common law as their birthright, and insist upon the enjoyment of its privileges. The congress of 1774 *unanimously resolved*, “That the respective colonies are entitled to the *common law of England*, and more especially to the great and inestimable privilege of being tried by their peers of their vicinage according to the course of that law.” And further, “that they were entitled to the benefits of such of the English statutes as existed at the time of their colonization, and which they have by experience respectively found to be applicable to their several and local circumstances.” And also that their “ancestors, at the time of their emigration, were entitled to all the rights, liberties and immunities of free and natural-born subjects within the realm of England.”²

¹ Jefferson's Correspondence, 178.

² Journal of Congress, Declaration of the Colonies, Oct. 14, 1774, pp. 27-31. See also 1 Chalm. Opinions, pp. 201, 220, 295; 1 Chalm.

§ 63. **Composite character of our common law.**—The complex character of our common law appears incidentally in the foregoing pages. It results naturally and necessarily from its history. From remote antiquity it has been developing with advancing civilization, the science of government, the lessons of experience and contributions from various sources. It has come down in living streams through all the vicissitudes of human history, casting off in its course the effete, the crude, the illiberal and unwise; and taking up and bearing on to us the wisdom and experience of the past, enriched by contributions from the best developments of humanity among all nations in every age. It is not, indeed, perfect,—perfection dwells not in the atmosphere of earth,—but it is more nearly so than any code of juridical law which the wisdom of any man, or body of men, ever did or ever can devise, and cast into an inflexible mold of statute law. An intimate acquaintance with general history is requisite for a thorough knowledge of the origin, growth and character of our common law. General history and a history of law are intimately connected, so intimately, indeed, that neither, abstractly considered, can be well understood. The laws of a country at any given period of its history are an outgrowth of, and an index to, its civilization and government. On the other hand, the character of a government and the condition of society are largely influential in shaping its laws. A law in force at an early period of English history, or in the middle ages, taken from its surroundings and placed in the setting of modern civilization, might present to our view a grotesque or even repulsive picture;

Annals, 677, 681, 682; 1 Tucker's Bl. 385; 2 Wilson's Law Lect. 48-50; Van Ness v. Packard, 2 Pet. 144; Chisholm v. Georgia, 2 Dall. 435; Town of Pawlet v. Clark, 9 Cranch, 292; Wheaton v. Peters, 8 Pet. 591.

and yet in its true time, place and circumstances it may have been a wise and appropriate law.

It may reasonably be assumed that, in addition to the known sources of the common law, some of its constituents are obsolete and forgotten statutes; and it is generally agreed by jurists that such is the fact.

Of our common law Judge Holmes says:¹ "The life of the law has not been logic; it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which we should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is we must know what it has been and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."

The complex character of the common law will more fully appear in following chapters, especially those pointing out the sources of the municipal law.

It may be pardonable for an American to suggest that a democratic government furnishes the most favorable conditions for the development of juridical law into its ideal character and functions; a government which de-

¹ "Common Law, by Oliver Wendell Holmes, Jr.," pp. 1, 2.

rives its life and power from the people, its creators and subjects; in which the citizen enjoys the largest freedom compatible with stability of the state, the due administration of justice and the welfare of society. A despotism, or absolute monarchy, gives little chance for the creation or development of an enlightened and beneficent system of law. An unjust decree of a despotic ruler, while in a technical sense a *law*, is not law in the true concept of the term. Despotic decrees *may* be in harmony with justice and equity; but when so, they are either an involuntary concession to irresistible popular demand, or the expression of natural goodness and justice which are the spring of all good laws, and which sometimes dwell in the breast of despotic rulers.

§ 64. **The federal government and common law.**—Early in our history, under the federal constitution, the important question arose whether the United States courts have common-law jurisdiction. Able judges differed in opinion on the question; but at length it was definitely and permanently settled in the negative.¹ But, while the federal government has no common law in the same sense, and with like effect, as that of England, and the individual states of our Union, the unwritten law is an important factor in our federal jurisprudence. “It is a general repository of rules, principles and forms;”² a “kind of expository common-law dictionary; a commentary upon the terms employed in the federal constitution, acts of congress, treaties, and other subjects of national jurisprudence. It is not a source of jurisdiction, but a guide and check, and expositor in the administration of

¹ Kent, Com., Lecture XVI; *Wheaton v. Peters*, 8 Pet. 658; *Kendall v. United States*, 12 Pet. 524; *Lorman v. Clark*, 9 McLean, 568; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 563; *Transportation Co. v. Parkersburg*, 107 U. S. 700.

² *Commonwealth v. Webster*, 5 Cush. 303, 323.

the rights, duties and jurisdiction conferred by the constitution and laws.”

Says Judge Story:¹ “It would be singular enough if, in forming a national government, that common law, so justly dear to the colonies as their guide and protection, should cease to have any existence as applicable to the powers, rights and privileges of the people, or the obligations and duties and powers of the departments of government. If the common law has no existence as to the Union, as a rule or guide, the whole proceedings are completely at the arbitrary pleasure of the government and its functionaries.”

Chancellor Kent writes:² “Though the judiciary power of the United States cannot take cognizance of offenses at common law, unless they have jurisdiction over the person or subject-matter given them by the constitution or laws made in pursuance of it, yet, when the jurisdiction is once granted, the common law, under the constitution and statute law of the United States, would seem to be a necessary and safe guide in all cases, civil and criminal, arising under the exercise of that jurisdiction, and not specially provided for by statute. Without such a guide, the courts would be left to a dangerous discretion, and to roam at large in the trackless field of their own imaginations.”³

In impeachment cases under federal administration, the common law is an indispensable guide.⁴

Except as above indicated, the federal government has no common law, civil or criminal, the jurisdiction of its courts being statutory.

¹ 1 Story, Const. (4th ed.), p. 564.

² 1 Kent, Com., p. 341.

³ See *United States v. De Groat*, 30 Fed. R. 766; *United States v. San Jacinto Ins. Co.*, 125 U. S. 280; *Cooley*, Const. Law, p. 130 *et seq.*;

⁴ 1 Bishop, New Crim. Law, §§ 110, 314, 599.

⁴ 1 Story, Const., § 796 *et seq.*; 1 Kent, Com., ch. XVI.

CHAPTER VI.

THE CRIMINAL LAW.

- SECTION 65. Distinguished from the civil law.
66. Criminal law defined.
67. Classification of criminal offenses.
68. Common-law crimes.
69. United States criminal law.

§ 65. **Distinguished from the civil law.**—Another leading division of juridical law is that of civil and criminal. To the latter, incidental reference has already been made.¹ The term “civil law,” as here used, is the same, substantially, as the common or municipal law hereinbefore explained.² It is not the civil law proper, the Roman jurisprudence, *jus civile Romanorum*. The latter system of law is embodied and illustrated in the institute, code and digest of the Emperor Justinian, and the novel constitutions of himself and other emperors.³ The Roman law is more fully explained in a subsequent chapter.⁴

§ 66. **Criminal law defined.**—Doctor Bishop, in his *New Criminal Law*, says:⁵ “A crime is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name. The criminal law is that department of the law of the courts which concerns crime.”

¹ *Ante*, § 34.

² Chs. IV and V.

³ 1 Bl. Com., p. 80.

⁴ Ch. —.

⁵ 1 Bish. *New Crim. Law*, § 32.

Blackstone writes:¹ "A crime or misdemeanor is an act committed or omitted, in violation of a public law, either forbidding or commanding it."

Either of these definitions is sufficiently accurate for its office in this connection, if not, indeed, for all practical purposes. A better could not be easily formulated. There are inherent difficulties in framing a definition that would be sufficiently accurate and flexible to meet all cases in the broad field, and multiform phases, of wrongs.

As a general rule, the test of a judicial prosecution, as to whether it be *criminal* or *civil*, is the party prosecuting. If it be the government or state in its own name, it is a criminal prosecution, and the offense charged is a crime; but if the plaintiff be a subject it is a civil action, and the wrong alleged is, in legal terminology, simply a *tort*.

And when an act is prohibited by statute under a penalty enforceable by indictment, it is criminal in view of the law, and its prosecution is a criminal proceeding; while an act prohibited by statute under a penalty recoverable in an action of debt is civil in its character and prosecution.

Further, in some cases, by statutory provision the government or state may prosecute an action of debt in its own name for the recovery of a penalty; so that the fact that the government or state is the prosecuting party in its own name does not, of itself alone, necessarily and invariably render the action a criminal prosecution.²

§ 67. Classification of criminal offenses.—Criminal offenses are sometimes classified as "crimes and misdemeanors;" so by Blackstone in his definition above quoted.

¹ 4 Bl. Com., p. 5.

² 1 Bish. New Crim. Law, §§ 31-34, and cases there cited; 2 Cooley's Bl., p. 4, n. 3.

He adds: "This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though, in common usage, the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of misdemeanors only."¹

Criminal offenses are, however, more generally classified as felonies and misdemeanors.² Mr. Bishop defines felony thus: "Felony is any offense which by the statutes or by the common law is punishable with death, or to which the old English law attached the total forfeiture of lands or goods, or both, or which a statute expressly declares to be such."³ Under this classification, all criminal offenses other than felonies, as thus defined, are misdemeanors.

Felony, in some of the United States, is defined by statute, and the definitions are not entirely uniform; so that what is declared to be a felony in one state may be only a misdemeanor in another; and where the offense is not thus defined, the common law governs.⁴

§ 68. Common-law crimes.—The common law embraces and deals with crimes. In other words, there are common-law as well as statutory crimes. So it was with the unwritten law of England at the birth of our national independence, which became ours by inheritance and has ever since, with few exceptions, been administered by our

¹ 2 Cooley's Bl., p. 4, and n. 2; Bish. New Crim. Law, §§ 623-625, 656-659.

² 2 Cooley's Bl., p. 4, n. 2, and p. 93, n. 1; Bish. New Crim. Law, § 615.

³ See last citation.

⁴ 2 Cooley's Bl., p. 93, n. (1); 1 Bish. New Crim. Law, §§ 616, 617; Ward v. People, 3 Hill, 395; Denman v. People, 10 Mich. 169.

judicial tribunals in the colonies and states so far as applicable to the changed conditions.¹

§ 69. United States criminal law.—It is the established doctrine, as we have seen,² that the United States in its organism and functions as the federal government has no common law, except as that law furnishes rules of decision in cases where its courts have jurisdiction over the person or subject-matter conferred upon them by the constitution and laws made in pursuance thereof. The logic of this doctrine is that the federal government derives its powers from the grant of the people made by the constitution, which powers are found only in the written law.

It follows logically that the United States has no criminal common law; that the criminal jurisdiction of its courts is limited to what is conferred by the laws of congress passed in pursuance of the constitution, specially "defining the offenses and describing what courts shall have jurisdiction over them." "No act can be a crime against the United States which is not made or recognized as such by the federal constitution, law or treaty."³

It should, however, be noticed in this connection that when the federal courts sit in the several states, in cases in which their jurisdiction depends upon the character or residence of the parties litigant, they administer the local law and are governed by the state common law and statutes, and follow the adjudications of the state courts.⁴

¹ 1 Bl. Com., pp. 68, 69; 1 Cooley's Bl., p. 68, and n. (3); Kent, Com., sec. XVI; 1 Bish. New Crim. Law, §§ 35-42, and cases cited.

² *Ante*, § 58.

³ Cooley, Princip. Const. Law, pp. 130, 131; *United States v. Hudson*, 7 Cranch, 32; Bish. New Crim. Law, §§ 198-203, where the question is thoroughly but succinctly treated.

⁴ Cooley, Princip. Const. Law, p. 131; *Livingston's Lessee v. Morse*,

Mr. Bishop¹ suggests with much plausibility that the unwritten law of crime, as applied in localities beyond state limits by the English jurisprudence, and the unwritten law of nations, and not within exceptional rules, constitutes a common law of the United States. That "accordingly, in reason, the United States tribunals would appear to have cognizance of common-law offenses upon the high seas, not defined by statute, and of all other offenses within the proper cognizance of the criminal courts of a nation, committed beyond the jurisdiction of any particular state." He adds, however, that this conclusion "does not as yet rest on a sufficient basis of judicial authority to be received as absolute law, and it is contrary to the *dicta* in some of the cases, and contrary to what is tacitly assumed in most of them. Yet it brings into harmony with the general doctrine several decisions which must otherwise be deemed unsound; and it is in direct conflict with perhaps one case."²

It is not unlikely that cases may arise presenting the alternative of an application of the doctrine above suggested as reasonable, or a failure of justice. The question involved, therefore, demands careful and intelligent consideration.

The United States has common-law criminal jurisdiction in the District of Columbia. This is due to the fact that, on the acquisition of that territory by the United States, the laws then existing therein were continued in force by statute.³

7 Pet. 469; *Tioga R. Co. v. Blossburg, etc. R. Co.*, 20 Wall. 137; *Townsend v. Todd*, 91 U. S. 289; *Railroad Co. v. Georgia*, 98 U. S. 359; 1 Kent, Com. (5th ed.), pp. 340, 341; 1 Story, Const., §§ 796-800; 1 Bish. New Crim. Law, §§ 198-203.

¹ 1 Bish. New Crim. Law, §§ 201, 202.

² *United States v. Coolidge*, 1 Wheat. 415.

³ Act of Congress, Feb. 21, 1871; R. S. of U. S. (2d ed.), § 3491; Ken-

The foregoing presents in outline the general principles and scope of the criminal law, especially as applicable to the United States, and furnishes sufficient guides to a study of its several branches. An exhaustive discussion of the subject, including the several classes of crimes and misdemeanors, together with criminal procedure, embracing pleading, evidence and practice, is not within the plan of this work. The subordinate branches and machinery of the criminal law can be studied more advantageously in works devoted specially to the respective branches of the general subject.

dall v. United States, 12 Pet. 524, 643; United States v. Guiteau, 1 Mackey (D. C.), 498; United States v. Watkins, 3 Cr. C. C. 441; McKenna v. Fisk, 1 How. (U. S.) 241, 249; Phillips v. Payne, 92 U. S. 130; Du Ponceau, Jurisd. 69-73; Bishop, First Book, § 109. And see 1 Bish. New Crim. Law, §§ 156-158, 203.

CHAPTER VII.

MILITARY AND MARTIAL LAW.

SECTION 70. Distinguished.

71. Military law.

72. Written military law.

73. Unwritten military law.

74. Martial law.

75. Military law, how administered.

76. Martial law, how administered.

§ 70. Distinguished.—Military, and martial, law so strongly resemble criminal law in some of their features that the popular mind fails to distinguish between them; yet they are not the same.

And, to the unlearned in legal terminology, the titles “military law,” and “martial law,” often convey the same meaning, it being assumed that these terms are used indifferently to signify the same branch of jurisprudence. And it must be confessed that the indiscriminate use of these terms sometimes met with in our legal literature, tends to obscure the distinction between them, even in the professional mind. Yet, while alike in their object, and similar in their general methods of administration, there are distinctions between them which should be understood, especially by the legal profession, and the officers of our government.

To prevent confusion these two branches of law will now be separately and briefly treated.

§ 71. Military law.—This branch of law is variously defined as follows: “It is a body of rules and ordinances

prescribed by competent authority for the government of the military state, considered as a distinct community.”¹ “Regulations for the government of persons employed in the army; the law applicable to military service and affairs.”² “Rules for the government and regulation of the land and naval forces.”³ “That branch of the laws which respects military discipline and the government of persons employed in the military service.”⁴

There is no conflict between these definitions, and together they define with sufficient accuracy the scope and functions of military law.

It will appear farther on in this chapter that the leading distinctions between military and martial law are, first, that the former applies especially to the government of the army and navy, and is created and administered by a constitutional and statutory code, being a written law; while the latter applies to all persons within the territorial limits of actual hostilities, and is the unwritten law of necessity in its creation and administration.

§ 72. Written military law.—United States military law is chiefly written, constitutional and statutory. The federal constitution provides that the congress shall have power—

“To declare war, grant letters of marque and reprisal, and to make rules concerning captives on land and water; to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for the calling

¹ O'Brien, Courts-Martial, 26; State v. Davis, 1 Southard, 311; In re Esmond, 5 Mackey, 64; 1 Bish. New Crim. Law, § 44.

² And. Dic. of Law, title “Military Law.”

³ Const. U. S., art. I, § 8, cl. 14; In re Griner, 16 Wis. 423; Cooley, Princip. Const. Law, p. 88.

⁴ De Hart, Courts-Martial, 16.

forth of the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress; to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.”¹ And further: “No State shall enter into any treaty, alliance, or confederation; grant any letters of marque and reprisal;” “no State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign Power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”²

The constitution also provides that: “The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States;” and that before entering upon the execution of his office, he shall take the following oath or affirmation: “I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.”³

¹ Const. U. S., art. I, § 8, cls. 11-18; R. S. U. S. (Bout. ed.), pp. 20 21, and cases there cited.

² Art. I, § 10, cls. 1, 3; R. S. U. S. (Bout. ed.), pp. 21, 22, and cases there cited.

³ Art. II, § 2, cl. 1; § 1, cl. 7; R. S. U. S. (Bout. ed.), p. 23, and cases there cited.

The foregoing fundamental provisions of the federal constitution on which our written military law is based are grouped in this connection for convenience of discussion and study, as not only specially applicable to the section under immediate consideration, but as bearing more or less upon the following sections.

Under the constitutional authority above specified, the congress has made elaborate provisions for the organization and government of the war and navy departments of the general government.¹

§ 73. Unwritten military law.—While the main body of the military law, especially in the United States, is constitutional and statutory, it is to some extent indebted to the unwritten law for its principles and rules.

The common-law element which is our national birth-right was derived from the ancient English court of *chivalry*, formerly held before the lord high constable and earl marshal jointly, but later, in respect to civil matters, was held before the earl martial only. This court was classed by English writers as a court-martial. It had cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as in it. Its procedure conformed to that of the civil or Roman law, after which the practice and proceedings of our courts of equity and admiralty are modeled; and to which our criminal law is largely indebted for its principles and rules.²

§ 74. Martial law.—This branch of law may be defined, in brief, as the law of necessity and force, invoked

¹ R. S. U. S. (Bout. ed.), titles XIV–XVII.

² 3 Bl. Com., p. 68; O'Brien, Courts-Martial, 26; State v. Davis, 1 Southard, 311; In re Esmond, 5 Mackey, 64; 1 Bish. New Crim. Law, §§ 44, 50, 52.

for the protection of society when, and where, civil law is paralyzed. It has been variously defined as follows: "Martial law is the law of necessity, the ordinary law, and the law of nature intermingled in such manner and proportions as the military power deems to be required by the particular emergency, when it supersedes or otherwise takes a control superior to the civil power."¹ "That military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things under and within the scope of active military operations, in carrying on the war, and which extinguishes or suspends civil rights and the remedies founded upon them, for the time being, so far as it may appear to be necessary in order to the full accomplishment of the purposes of the war."²

There is no conflict between these definitions and others found in the books; and together they define with sufficient accuracy and fullness the scope and functions of martial law.

From the foregoing definitions of military and martial law, respectively, the distinction between them is manifest, and may thus be concisely stated: Military law is that branch of the law of the land prescribed by the government for the conduct of the citizen as a soldier. It is administered by military tribunals, and is in force in times of peace as well as in war. But it does not suspend the civil law, for any breach of which the soldier is liable to the same trial and punishment as the civilian. Martial law, on the other hand, is the military rule and authority *in time of war*, as more fully stated by Prof. Parker, in his definition above quoted.³

¹ Ibid., § 45.

² Prof. Joel Parker, in N. A. Rev., Oct., 1861.

³ 1 Cooley Bl. (3d ed.), p. 413, n. (4); Benet, Military Law, 14; Luther

A more extended discussion of the character, office and scope of martial law the writer thinks is unnecessary for the intelligent reader.

It should be specially noted in passing that martial law has no existence in, or application to, a condition of peace; that except in time of war, rebellion, insurrection or invasion, when necessity requires the interposition of military force for the protection of society, martial law is subordinate to civil rule.¹

At an early day a conflict arose between some of the states of the Union and the president of the United States in regard to calling the militia of the states into the service of the United States. On the part of the states it was contended that the power of deciding when an emergency existed for calling the militia into the service of the United States, and of executing that power, under the provisions of the federal constitution cited above,² belonged to the governors of the respective states; while it was insisted on the other hand that the authority in question was vested by the constitution in the president of the United States, as commander-in-chief of the army and navy of the United States. After much able and earnest discussion the question was finally and definitely settled by the supreme court of the United States in favor of the power claimed and assumed by the chief executive of the general government. The states have the appointment of the officers, but "the bodies of militia called into

v. Borden, 7 How. 1; *Ex parte Milligan*, 4 Wall. 2. The learned criticism of the *Milligan* case by Dr. Bishop is worthy of careful consideration. 1 Bish. New Crim. Law, § 64, note; 3 Greenl. Ev., § 468; 1 Bish. New Crim. Law, §§ 52, 53; And. Law Dic., title "Military Law."

¹ 1 Bish. Crim. Law, § 53.

² *Ante*, § 67; 1 Kent, Com., pp. 262-266; 2 Story, Const., §§ 1179-1192; Cooley, Princip. Const. Law, pp. 88, 89; *Martin v. Mott*, 13 Wheat. 19; *Houston v. Moore*, 5 Wheat. 1.

the service of the United States are subject not only to the orders of the president as commander-in-chief, but also to those of any officer outranking their own, who may, under the authority of the commander-in-chief, be placed over them.”¹ Judge Cooley is fully sustained, both by reason and the highest authority, in his statement that the “federal government is supreme in all that pertains to war, with subordinate authority in the states.”²

§ 75. **Military law, how administered.**—Military law is administered by courts-martial. The congress, under the authority of the federal constitution, has made full provisions, in the Articles of War, for the organization of, and the practice and proceedings in, courts-martial.³

§ 76. **Martial law, how administered.**—As martial law is the law of military necessity, formulated and governed by no fixed code, its administration is necessarily arbitrary, largely subject to the discretion and will of a military commander. “The commander is the legislator, judge and executioner.”⁴ Says Lieber: “Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war. The character of the courts which ex-

¹ Cooley, Princip. Const. Law, 89.

² See connections with the last citation.

³ R. S. of U. S. (Bout. ed.), sec. 1342, arts. 71-121, pp. 237-241; Bell v. Tooley, 11 Ire. 605; Brooks v. Adams, 11 Pick. 441; Ex parte Bright, 1 Utah, 145; Lieber, Instruct., pl. 13; 1 McArthur, Courts-Martial (3d ed.), § 2; O'Brien, Courts-Martial, 26.

⁴ Re Egan, 5 Blatch. 321-323; United States v. Dickelman, 92 U. S. 526.

ercise these jurisdictions depends upon the local laws of each particular country. In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the 'Rules and Articles of War,' or the jurisdiction conferred by statute on courts-martial, are tried by military commission."¹

"Offenses against martial law and the laws of war, and all acts not justified by the laws of war, which are calculated to impede or obstruct the operations of the military authorities, or to render abortive any attempt by the government to enforce its authority, may be punished by military courts or commissions organized by the president as commander-in-chief, or by the immediate military commander, or established under the authority of congress. But these tribunals cannot try offenses against the general laws when the courts of the land are in the performance of their regular functions, and no impediment exists to a lawful prosecution there."²

Intimately connected with this subject is the provision of the federal constitution in regard to the suspension of the writ of *habeas corpus*.³ But the consideration already given to this provision in another connection⁴ renders its further discussion unnecessary.

¹ Lieber, *Instruot.*, pl. 13. And see *Ex parte Vallandigham*, 1 Wall. 243.

² Cooley, *Princip. Const. Law*, pp. 137, 138, 152; *Jecker v. Montgomery*, 13 How. 498; *The Grape Shot*, 7 Wall. 129; *Edwards v. Tannert*, 12 Wall. 776.

³ Art. I, § 9, cl. 2.

⁴ *Ante*, § 33, subd. 4.

CHAPTER VIII.

EQUITY JURISPRUDENCE.

SECTION 77. Defined.

78. Subjects of equity jurisdiction.

79. English courts of equity.

80. United States equity courts.

81. Difference between law and equity courts.

§ 77. **Defined.**—Equity jurisprudence is that distinct branch of juridical law, expressed elliptically by the term “equity,” whose rules and procedure are more flexible than those of the common law, and which afford relief in cases of wrongs committed or threatened, where the common law is inadequate by reason of its strictness and limited range of jurisdiction. The books contain numerous definitions of equity, some of which, it is believed, were inspired by an erroneous conception of the true character and office of equity, while others, if correct at the time of their formulation, are inapplicable to the present development of the system.

The most common error of the past is that which gives to the term “equity,” in the administration of justice, the sense of divine morality, and assumes that its use and application in practice is left to the judgment and conscience of the presiding magistrate, without established rules or precedents for guidance. Whereas, in fact, equity is, at present, a well defined body of principles and rules and not the accident of variant individual consciences and judgments, one thing to-day and something different to-morrow, in its treatment of like facts and circum-

stances. Yet, in the language of Professor Pomeroy, "the system was, and is, much more elastic and capable of expansion and extension to new cases than the common law. Its very central principle; its foundation upon the eternal verities of right and justice; its resting upon the truths of morality rather than upon arbitrary customs and rigid dogmas, necessarily gives it this character of flexibility, and permitted its doctrines to be enlarged so as to embrace new cases as they constantly arose.

It has, therefore, as an essential part of its nature, a capacity of orderly and regular growth, a growth not arbitrary, according to the will of individual judges, but in the direction of its already settled principles. It is ever reaching out and expanding its doctrines so as to cover new facts and relations, but still without any break or change in the principles and doctrines themselves."¹

The difference between the erroneous, and the true, theory of equity above indicated is this, in brief: the erroneous assumes that the judge, in its administration, adopts the Divine Code for his guide, relying upon his own interpretation of its provisions, and with his own view of its applicability to the case in hand, untrammelled by precedents; the other and true theory is: that the system is a well-defined embodiment of principles and rules, founded upon Divine justice and morality, to which its administration must conform, uninfluenced by the individual ethics of the judge; yet possessing the expansive and adaptive character above expressed.

Equity, like common law, is a growth, taking form and substance from the successive stages and different conditions of progressive civilization, and deriving its increment from various sources. Many of its germs were embodied in the Roman jurisprudence; and some of the

¹ Pom. Eq. Jur., § 59.

wisest and most beneficial provisions of our equity system are directly traceable to that law as their fountain head. Indeed, some publicists of eminent ability do not hesitate to assign the origin of English and American equity jurisprudence to the Roman law.

From the general view now taken, it is apparent that a careful study of its history from an early period to the present time is essential to a thorough knowledge of this very interesting and important branch of juridical law. A full discussion of the subject is not within the scope of this outline treatise. There are reliable works accessible to the reader in which this subject is discussed, in some of them quite learnedly and fully; to some of the more important and useful of these reference is made below.¹

§ 78. **Subjects of equity jurisdiction.**—The general subjects within the jurisdiction of equity, and to which its rules and procedure are specially adapted, are the following, viz.: Fraud, accident, mistake, account, infants, lunatics and idiots, married women, specific performance, foreclosure of mortgages, dower, interpleader, partition, bills of peace, bills *quia timet*, and injunctions. This catalogue alone, without elaboration and discussion, will indicate, even to a non-professional person, the vast and highly important field of equity jurisdiction in the diversified interests of human affairs. For an application of the rules of equity to the several subjects named, and the methods of dealing therewith, the authorities already cited and others devoted to equity procedure and practice will furnish full explanation; the limits of this work will not permit discussion in detail.

¹Story's Eq. Jur.; Pom. Eq. Jur.; Spence's Equitable Jurisdiction of the Court of Chancery; Pom. Munic. Law, §§ 31-34, 43 especially, the whole work as a study; 1 Bl. Com., pp. 61, 92; 3 Bl. Com., pp. 429-437; Sandars' Inst. of Just., pp. 67-71; Poste's Inst. of Gaius, pp. 368, 400-406.

§ 79. **English courts of equity.**—In the history of English jurisprudence there were several courts of different names that had to a greater or less extent equity jurisdiction; but the chief of these was the court of chancery, so called from the name of its head, the lord high chancellor. It is not requisite for our present purpose to describe other English courts having limited equity powers, or to point out the antecedent conditions which led to the English court of chancery, in its full development; these will be found in the works referred to in the last section, and in the further authorities cited below.¹ The whole judicial and semi-judicial force of this high court of equity in its maturity consisted of the lord high chancellor of England and his subordinates, viz.: Master of the rolls, vice-chancellor of England, two other vice-chancellors, two judges of appeals in equity, and masters whose duties were semi-judicial and clerical. To each of these officials were assigned prescribed duties, and all combined constituted the unit of the English court of chancery which administered justice and equity without the intervention of a jury. From the decisions of this court an appeal might be taken to the house of lords.

In 1873 the distinction between courts of law and courts of equity was abolished in England, and the two jurisdictions blended in one court. By what is denominated the “English Judicature Act” of that year, the higher tribunals were consolidated into one supreme court of judicature; and by which act it was provided that “in every civil cause or matter, law and equity shall be concurrently administered.” This change did not abolish the essential distinction between law and equity

¹2 Cooley's Bl., pp. 45-58, 426-454, text and notes; 1 Story's Eq. Jur., ch. II; Pom. Munic. Law, §§ 163-166, 218, 233; 1 Pom. Eq. Jur., § 10 *et seq.*

theretofore existing, but simply provided in effect that legal and equitable rights should thereafter be enforced, and legal and equitable remedies granted in the same action and by one and the same court and judge.

§ 80. **United States equity courts.** — The United States, we have seen,¹ inherited from England the common law as it then existed in the mother country; and the same is true in respect to our equity jurisprudence. The founders of our republic were at liberty to adopt such parts of both systems as in their judgment were applicable to the genius of our government and the conditions of the country, and to reject the rest, and so in fact they did. While this was the fountain from which the principles of our equity system issued, the sources of English equity jurisprudence have always been available to us for study and revenue, and have aided in molding and perfecting our own system. What has already been said in regard to the jurisdiction and procedure of the English courts of equity will apply, in principles and words, to like courts of the United States, and need not be repeated.

The constitution of the United States provides² that the “judicial power” of the United States “shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.” Under the constitution and laws made in pursuance thereof, equity jurisdiction is vested in the supreme, circuit and district courts, the procedure and practice being prescribed by congress. It is provided in the judiciary code that “suits in equity shall not be sustained in either of the courts of

¹ *Ante*, ch. V.

² Art. III, sec. 2; 2 Story, Const., §§ 1637-1777; 1 Story's Eq. Jur., §§ 56-58 and notes; 4 Kent, Com., p. 163, note (d).

the United States in any case where a plain, adequate and complete remedy may be had at law.”¹

The jurisdiction, powers and procedure of the several state courts of equity are defined by their own constitutions and laws, respectively, and differ more or less in detail, while all bear the impress of English jurisprudence. There is a lack of uniformity in the states in respect to their courts, especially their courts of equity, each state being at liberty to determine the character of its own. In some states there are no tribunals, distinct from the law courts, with express equity powers; in others the superior courts possess both law and equity powers, adopting in the administration of each class the rules and procedure applicable thereto; while in a few of the states there are separate tribunals of law and equity, the latter, in their jurisdiction and general features, being modeled after the English court of chancery. In the state of New York, for example, there was a separate court of equity, denominated the “Court of Chancery,” consisting of a chancellor, vice-chancellor, and subordinate officials, having in its organization, functions, and procedure the main features of the English court of chancery. On its abolition in 1846, the administration of equity passed to the law courts, by which both law and equity have since been dispensed, each in accordance with its own established rules, but in the same action or proceeding. At present courts of equity, as separate tribunals, have quite generally disappeared from the jurisprudence of the United States.²

§ 81. Difference between law and equity courts.—It will be seen from the foregoing view of the equity courts

¹ R. S. of U. S. (Bout. ed.), sec. 723, p. 137, and cases there cited.

² Pom. Munic. Law, §§ 166, 167; 1 Pom. Eq. Jur., §§ 40-42, and notes; 2 Story, Const., §§ 1637-1777.

of England and the United States, and the authorities cited, that the principal difference between law and equity courts consists in three things, viz.: 1, in their organization; 2, in their jurisdiction respectively; and 3, in their modes of procedure and practice. The first and second divisions, in their main features, have been delineated sufficiently, it is believed, to give the intelligent reader a correct idea of the true character and functions of courts of equity. A discussion of equity procedure and practice would be inconsistent with the compendious character of this work; these subjects are fully treated by able authors whose works are accessible to all who may, for any reason, wish to acquire a thorough knowledge of equity procedure and practice. For the convenience of such persons some of the leading authorities on the subject are named below.¹

The erroneous impression has prevailed to some extent that there is an irreconcilable antagonism between the respective systems of law and equity. A quotation from that eminent jurist, the late Judge Cooley, in correction of this false impression, will close the present chapter. He says:² "It is not to be assumed, because the system of equity has grown up as an independent and distinct system from that of the common law, that therefore the two are opposed and hostile to each other, and may be expected to operate at cross purposes. On the contrary, they are to be regarded as the two parts of a complete and symmetrical structure, the purpose of which is to accomplish justice in all the varying circumstances of human transactions. On the other hand, we are not to suppose,

¹ Daniell's Ch. Pr.; Mitford's Eq. Pl.; Cooper's Eq. Pl.; Van Santvoord's Eq. Pr.; Story's Com. Eq. Pl.; Barbour's Ch. Pr.; Curtis' Eq. Precedents.

² 2 Cooley's Bl., p. 426, note (1).

because equity is said to supply the defects of the common law, that it may do this at the discretion of the chancellor, and regardless of other rules than his own sense of what is right and just. It needs but the most cursory examination to show that the jurisdiction of equity is very clearly defined and limited, and that the discretion of the chancellor in administering this discretion is closely restrained within the lines of precedents which have evolved general rules for his guidance."

CHAPTER IX.

ADMIRALTY AND MARITIME LAW.

SECTION 82. Definitions.

83. Historical summary.
84. Admiralty jurisdiction.
85. United States admiralty jurisdiction.
86. Admiralty jurisdiction of the state courts.
87. Prize courts and cases.
88. Torts and crimes.
89. Sources of our admiralty and maritime law.
90. Subjects of admiralty and maritime law.
 1. Ownership and use of the vessel.
 2. Seamen's wages.
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 4. Contracts of affreightment.
 5. Pilotage.
 6. Maritime liens.
 7. Bottomry and *respondentia* bonds.
 8. Average contribution.
 9. Salvage.
 10. Torts.
91. Admiralty procedure and practice.

§ 82. Definitions.—The terms *admiralty* and *maritime*, as used in law, embrace and designate both a particular court and a special class of cases. The term *maritime*, from its etymology and significance, properly applies to a class of cases, namely, controversies arising out of the navigation of the sea and other public waters; while the term *admiralty* names the court in which the cases are, for the most part, adjudicated. The name of this court is due to the fact that originally maritime causes were tried by a single naval official possessing judicial power

for the purpose, known by different names in different countries,—in England the lord high chancellor or his deputy. It was then called the “Admiral’s Court;” but since the jurisdiction passed from the one-man power to an organized judicial tribunal, it is called the court of admiralty.

It should be noticed in passing that the term *admiralty* is often used in our legal literature to signify that system of jurisprudence, as well as to characterize the court itself. So, also, it may be observed that the term *maritime* is frequently applied to the court, instead of the subject-matters of its jurisdiction. The respective terms are used interchangeably, and often indiscriminately; but they are so intimately related that no confusion or embarrassment need arise from this lack of accurate discrimination.¹

§ 83. **Historical summary.**—A brief historical sketch of the rise and progress of admiralty and maritime law will furnish the student with valuable information, and point the way to a full investigation of this interesting and important branch of jurisprudence.

All nations engaged to any considerable extent in commerce have had their maritime rules, simple or complex, fragmentary or systematized. There has been a law of the sea as well as a law of the land. The two juridical systems are necessarily unlike in details and administrative procedure, yet the same in ethics and fundamental principles, each being adapted to the conditions and wants of its own jurisdiction.

Some difficulties are encountered in searching for the sources of maritime law, for the want of written codes

¹ 2 Cooley’s Bl., p. 105 *et seq.*; And. Law Dic., titles Admiralty and Maritime; The *Genesee Chief v. Fitzhugh*, 12 How. 454–459; The *Hine v. Trevor*, 4 Wall. 562–570; The *Belfast*, 7 id. 639–641; The *Eagle*, 8 id. 23–29; *Ex parte Easton*, 95 U. S. 70; The *Lottawanna*, 21 Wall. 572–576; Benedict’s Adm., §§ 40–44; Pom. Munic. Law, §§ 172, 173, 610 *et seq.*

embodying the rules which governed sea commerce in the early ages. Chancellor Kent writes thus: "Though the maritime law of modern Europe had its foundation laid in the jurisprudence of the ancients, there is no certain evidence that either the Phœnicians, Carthagenians, or any of the states of Greece, formed any authoritative digest of naval laws. These powers were distinguished for navigation and commerce, and the Athenians in particular were very commercial, and they kept up a busy intercourse with the Greek colonies in Asia Minor, and in the borders of the Euxine and the Hellespont, in the islands of the *Ægean*, and in Sicily and Italy."¹

It may reasonably be assumed, however, that the early nations adopted by tacit consent, or specific agreement, such rules and regulations, from time to time, as their seafaring industries and commercial intercourse required.

The Rhodians, who became masters of the seas about nine hundred years prior to the Christian era, are credited with being the first people that digested and promulgated a system of maritime jurisprudence. But the only authentic portion of this code which has survived national vicissitudes is found in the Roman law, in a single title of the *Pandects*.² For the preservation of this fragment the world is indebted to Emperor Augustus, who sanctioned the laws of the Rhodians as rules of decision for maritime causes at Rome.

The next collection of maritime rules claiming attention is known as the "*Amalphi*tan Table." It was compiled for the republic of Amalphi towards the end of the eleventh century. The authority of this compilation, it is said, became supreme in all the states of Italy, superseding prior marine laws; but it was soon lost to the world through the destructive conflicts of national hostilities.

¹ Kent, Com., vol. III, p. 2.

² Dig. 14, 2.

Following in the order of maritime codes was a compilation of the usages and laws of the Mediterranean powers, and published under the title of the "*Consolato del Mare*." Its influence as a maritime code became extensive and controlling among all the commercial powers of Europe. The authorship of this code remains in doubt, having been claimed with more or less plausibility by several nations. Chancellor Kent says of this code:¹ "It is, undoubtedly, the most authentic and venerable monument extant, of the commercial usages of the middle ages, and especially among the people who were concerned in the various branches of the Mediterranean trade."

Next came the laws of Oleron, so called from the island of Oleron, on the coast of France, where, it is claimed, they were collected and published. As to the place whence this code issued, whose name it bears, there is no disagreement; but its authorship is claimed both by France and England. The claim of France rests naturally upon the birth-place of its compilation and issue, in the lack of agreement respecting its individual authorship. In support of England's claim it has been held by distinguished publicists that these laws, or judgments as they were sometimes termed, were made by King Richard I. on his return from the Holy Land in the latter part of the twelfth century, who remained some time on the island of Oleron, then a part of his dominions, where, it is suggested, he pronounced these judgments in the manner of the rescripts of the Roman emperors.² It is supposed that this body of laws, or rescripts, was founded upon the Rhodian laws and the *Consolato del Mare*, with additions and adaptations to the commerce of western Europe. But whatever may have been the origin of

¹ Kent's Com., vol. III, pp. 10, 11.

² Benedict's Adm., § 51.

these laws, there is no dispute in regard to their great value and molding influence upon subsequent maritime laws. They have held their place to the present time as authority in the courts of England, and also in this country.¹

We may next notice the laws of Wisbuy, compiled, it is said, by the merchants of the city of Wisbuy, in the island of Gothland, in the Baltic sea, about the year 1828. It is affirmed on high authority that these laws were but a supplement to the laws of Oleron, and constituted the maritime law of all the Baltic nations north of the Rhine, in like manner as the laws of Oleron governed in England and France, and the provisions of the *Consolato* on the shores of the Mediterranean. "They were," says Chancellor Kent, "on many points, a repetition of the laws of Oleron, and became the basis of the ordinances of the Hanseatic league."²

This reference to the Hanseatic league calls for a brief account of that eminently wise and widely influential combination. It originated with the cities of Lubec, Bremen, and Hamburg, about the year 1254, and was designed as a protection to their commerce, and a defense against the invasion of outside barbarians, to whose hostile incursions the free Hanseatic towns were subject. The confederacy proved so beneficial to its constituents that other states were drawn within its folds, and it ultimately embraced all the cities and large towns on the Baltic, and on the navigable rivers of Germany. For their protection and government the confederates adopted a maritime code, formed on preceding sea-laws, espe-

¹ Walton v. The Ship Neptune, 1 Peters' Adm. Dec. 142; Matherstrom v. Ship Hazard, 2 Hall's L. J. 359; Sims v. Jackson, 1 Pet. Adm. Dec. 157.

²3 Kent's Com., p. 18, where he cites the authority of Clirac.

cially the laws of Oleron and Wisbuy. In 1614 delegates from the several constituencies met in convention at Lubec and revised and enlarged their code, which was issued under the title "*Jus Hanseaticum Maritimum.*" This production was published at Hamburg in 1667, with a commentary by Kuricke, and took high rank in maritime jurisprudence which it has ever since held.

Of modern maritime legislation the most notable and important is that of the French Maritime Ordinance of 1661. This ordinance, which has reflected much glory upon the reign of Louis XIV., is largely due to the genius and administrative wisdom of Colbert, his minister and secretary of state, and also inspector and general superintendent of commerce and navigation. The production of this celebrated work required an intimate acquaintance with all the known maritime codes of the world; the existing conditions of civilization and commerce to which each was adapted, with their excellencies and defects, respectively; a thorough knowledge of the existing national wants, together with a sagacious forecast of the future; and exceptional skill in adapting means to ends. Manifestly a work of great magnitude; but Colbert was equal to the task; and, as such a work in detail required the assistance of subordinates, he had the important faculty of selecting the right men for his purpose. The outcome was an ordinance which largely exceeded in value all prior and then existing maritime codes.

In addition to the more important codes now mentioned, the great body of admiralty and maritime law has been enriched, developed and adapted to new conditions by commentaries, legislation and judicial decisions, a specific reference to which the limits of this treatise will not permit.

"The English nation," says Chancellor Kent,¹ "never

¹ Kent's Com., p. 18.

had any general and solemnly enacted code of maritime law resembling those which have been mentioned as belonging to the other European nations and promulgated by legislative authority. This deficiency was supplied, not only by several extensive compilations, but it has been more eminently and more authoritatively supplied by a series of judicial decisions, commencing about the middle of the last century." England and other commercial nations are largely indebted to that pre-eminent jurist, Lord Mansfield, who, by his exhaustless store of legal knowledge, embracing the maritime codes and compilations known in his day, disclosed to the English bar their great value, and inspired in the judiciary a respect for their authority, theretofore unknown in that kingdom.

Some general authorities are cited below for the benefit of readers who may wish to make a more exhaustive study of this subject.¹

§ 84. **Admiralty jurisdiction.**—In juridical nomenclature, jurisdiction signifies the power of courts to entertain, hear and determine legal and equitable actions and proceedings. This jurisdiction is limited by places, persons and subject-matter, all judicial tribunals having, severally, defined limitations. Broadly stated, the jurisdiction of admiralty courts is limited to maritime controversies, namely, such as pertain to the navigation of the sea and other public waters.² But while this is true etymologically, and by the general consensus of civilized nations, there has been more or less disagreement among the nations, and even in the same nation at different periods of its history, in respect to the subjects embraced

¹ 3 Kent's Com., sec. XII; Benedict's Adm., §§ 3, 51 *et seq.*; 2 Cooley's Bl., pp. 68, 105 *et seq.*; Pom. Munic. Law, pp. 351-357, together with the authorities thereunder respectively cited.

² *Ante*, § 82.

in the designation "maritime controversies." These differences, however, have not been due to any inherent difficulty of discrimination, but rather to adventitious circumstances. English admiralty jurisdiction, for example, at the time of the American Revolution, was restricted to narrow limits compared with its scope at an earlier period, or with that of the United States. This condition was the outcome of a bitter controversy or rivalry between the common-law courts and the court of admiralty. It is sufficient to say here in explanation that power was with the law courts, and was used effectively, to narrow the jurisdiction and lower the prestige of English admiralty courts.¹

It may conduce to a better understanding of English admiralty to state that its jurisdiction did not originate in a statutory grant, but in a commission from the crown, in virtue of the royal prerogative.² A change was made in the English judicial system by acts of parliament in 1873 and 1875, which, among other provisions, defined the jurisdiction of the high court of admiralty.³ It should be noted also that the jurisdiction of the English court of admiralty embraces three classes of subjects which give it, by custom, different names, each signifying the particular subject of its jurisdiction, viz.: first, prize courts, having cognizance of questions relating to prizes of war; second, instance courts, having jurisdiction of civil suits of a maritime character between party and party; and third, criminal courts, having jurisdiction of maritime crimes, all included in the admiralty jurisdiction.⁴ It will be seen that "admiralty court" and "in-

¹ Benedict's Adm., §§ 6, 14, 74, 75, 81, 98, 105, 110-113, 188; Edw. Adm. Jur. 17; Dunlap's Adm. Prac. 13; Pom. Munic. Law, 517; 2 Story on Const., §§ 1663-1674.

² Benedict's Adm., §§ 47-50, 109, 118, 123, 141.

³ 2 Cooley's Bl., p. 30, n. (1).

⁴ Benedict's Adm., § 330; 2 Cooley's Bl., p. 107, n. (1).

stance court," having substantially the same meaning, are sometimes used interchangeably in the books, tending to confusion in the mind of the reader.

§ 85. **United States admiralty jurisdiction.**— Under the government of the United States, admiralty jurisdiction is established and regulated by the federal constitution and congressional legislation. It is conferred upon the general government by the constitution, and its distribution and regulation devolved upon the congress.¹

In the exercise of its constitutional power, congress has made the following provisions, viz.: United States district courts are clothed with jurisdiction "of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital;" "of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, when the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit court. And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine."²

The exception referred to in the foregoing section relates to the proceedings for the condemnation of property taken as prize, in pursuance of section 5308, in which cases circuit courts have jurisdiction.³ And the proceed-

¹ U. S. Const., art. III, sec. 2.

² R. S. of U. S. (Bout. ed.), sec. 563, paragraphs 1 and 8, pp. 94, 95.

³ Id., p. 111, par. 6.

ings there referred to are such as occur in cases of insurrection against the government; in which cases circuit courts have concurrent jurisdiction.¹

It is also provided that "the trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable rivers connecting the lakes, the trial of issues of fact shall be by jury when either party requires it."²

It is further provided, in effect, that in all causes of admiralty jurisdiction, in which jurisdiction is vested in the courts of the United States, it shall be exclusive of the courts of the several states; saving to all suitors in all cases, the right of a common-law remedy, when the common law is competent to give it.³

It is further provided that, "from all final decrees of a district court in causes of equity or of admiralty and maritime jurisdiction, except prize cases, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, an appeal shall be allowed to the circuit court next to be held in such district, and such circuit court is required to hear and determine such appeal."⁴

Further, "an appeal shall be allowed to the supreme

¹ Id., p. 1031, secs. 5308, 5309.

² Id., p. 97, sec. 566.

³ Id., sec. 711, par. 3, pp. 134, 135.

⁴ Id., sec. 631, p. 113.

court from all final decrees of any district court in prize causes, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars; and shall be allowed without reference to the value of the matter in dispute on the certificate of the district judge that the adjudication is of general importance. And the supreme court shall receive, hear and determine such appeals, and shall always be open for the entry thereof.”¹

It is further provided that, “An appeal shall be allowed to the supreme court from all final decrees of any circuit court, or of any district court acting as a circuit court, in cases of equity, and of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, and the supreme court is required to receive, hear and determine such appeals.”²

There is a further enactment relating to procedure in admiralty and maritime causes, providing that the circuit court in such causes shall find the facts and the conclusions of law separately, and the court may, upon the consent of the parties, impanel a jury to whom shall be submitted the questions of fact, as in cases at common law.³

The above quotations comprise the constitutional and statutory jurisdiction of the United States courts in admiralty and maritime causes. For the action of congress references have been made to Boutwell's edition of the Revised Statutes of the United States; and for the reason that this compilation gives, not only the text of the several provisions, but the exposition and construction there-

¹ Id., sec. 694, p. 129.

² Id., sec. 692, p. 129.

³ Sup. to R. S. of U. S., ch. 77, p. 62. And see Story on Const., §§ 1663-1674; 1 Kent's Com., pp. 853, 360-367, 371, 377, 378; Benedict's Adm., §§ 15, 16-19.

of by the supreme court of the United States, in the case of every provision upon which that tribunal has passed; a very convenient and valuable arrangement for the student and practitioner.

Says Judge Story:¹ "The admiralty and maritime jurisdiction conferred by the constitution embraces two great classes of cases,—one dependent upon locality and the other upon the nature of the contract. The first respects injuries done upon the high sea, where all nations claim a common right and common jurisdiction; or acts or injuries done upon the coast of the sea; or, at furthest, acts or injuries done within the ebb and flow of the tide. The second respects contracts, claims and services purely maritime, and touching rights appertaining to commerce and navigation. The former is again divisible into two great branches,—one embracing captures and questions of prize arising *jure belli*; the other embracing acts, torts and injuries strictly of civil cognizance, independent of belligerent operations." Since this was written by that eminent judge, the jurisdiction of the United States admiralty courts has been extended, by congressional action and judicial construction, to the great lakes and their navigable waters, and to the great rivers, even though their navigable course may be entirely within the limits of a single state.²

§ 86. Admiralty jurisdiction of the state courts.—Prior to the American Revolution, the British colonial courts of this country had a more extensive admiralty jurisdiction than did the English home admiralty courts.

¹ Story on Const., § 1666.

² References above; *The Lottawanna*, 21 Wall. 528; *The Moses Taylor*, 4 Wall. 411; *The Belfast*, 7 Wall. 624; *Leon v. Galceran*, 11 Wall. 185; *The Genesee Chief*, 12 How. 443; *The Eagle*, 8 Wall. 15; *Fretz v. Hull*, 12 How. 466; *Cooley's Princip. Const. Law*, p. 114 *et seq.*

This difference, the statement of which at first view appears improbable, is due to the fact that the colonial courts derived their authority directly from the king's commission, and were not restricted by hostile legislation instigated by the law courts, as were the English admiralty courts; the established rule being that British statutes do not bind the colonies unless expressly therein named, and in none of the acts of parliament affecting admiralty jurisdiction were the American colonies named.¹ In the transition from English colonies to American states, our territorial courts of admiralty lost none of their judicial power or jurisdiction, each retaining its own in full measure; but among the independent states, each determining and regulating its own judicial system, there was much variety in the organization and jurisdiction of their admiralty courts; some, even, having no distinctive admiralty and maritime tribunals, their appropriate functions being exercised by other courts.²

To the federal government on its organization the states and territories granted a portion of their sovereignty and powers, reserving the residue to themselves and the people of the United States. These grants are embodied in the constitution of the United States, which consists of certain enumerated powers,³ among which is that of the judicial power in "all cases of admiralty and maritime jurisdiction."⁴

The true construction of this grant has given rise to much judicial discussion, and some contrariety of opinion among learned jurists; and, indeed, it cannot be confidently affirmed that the differences of opinion developed

¹ *Ante*, § 84; Benedict's Adm., §§ 118, 161.

² Benedict's Adm., §§ 166-171.

³ *Ante*, ch. IV.

⁴ U. S. Const., art. III, § 2; *ante*, § 85.

by the discussion have all yet been definitely settled. One question involved is, in the language of Judge Story, "whether judicial power of the United States in any cases, and if in any, in what cases, is exclusive in the courts of the United States, or may be made exclusive at the election of congress."¹ The judge further says: "It would be difficult, and perhaps not desirable, to lay down any general rule in relation to the cases in which the judicial power of the courts of the United States is exclusive of the state courts, or in which it may be made so by congress, until they shall be settled by some positive adjudication of the supreme court. That there are some cases in which that power is exclusive cannot well be doubted; that there are others in which it may be made so by congress, admits of as little doubt; and that in other cases it is concurrent in the state courts, will scarcely be denied."²

Quoting further from Judge Story: "It is a far more difficult point to affirm the right of congress to vest in any state court any part of the judicial power confided by the constitution to the national government. Congress may, indeed, permit the state courts to exercise a concurrent jurisdiction in many cases; but those courts then derive no authority from congress over the subject-matter, but are simply left to the exercise of such jurisdiction as is conferred on them by the state constitution and laws."³

More than half a century has elapsed since Judge Story wrote as above quoted, during which time the leg-

¹ Story on Const., § 1748, and cases there cited.

² Id., § 1754, and citations thereunder.

³ Story on Const., § 1755; *Houston v. Moore*, 5 Wheat. 27, 28. And see Cooley's Princip. Const. Law, pp. 113-120; Pom. Munic. Law, §§ 99-102; Benedict's Adm., §§ 19, 45, 116-171; 1 Kent's Com., p. 353 *et seq.*; *ante*, § 85.

islation of congress and adjudications of the supreme court have contributed in a measure to a settlement of the vexed questions connected with this subject; but it cannot confidently be said that no further difficulties of construction will arise. That point reached, jurisdictional difficulties will disappear; for all admiralty and maritime causes, not within the exclusive jurisdiction of the federal courts, will be open to the state courts exclusively or concurrently, in their respective territorial spheres.

§ 87. **Prize courts and cases.**— This branch of admiralty jurisdiction has already been incidentally referred to; but its importance, and in some respects exceptional features, suggest further brief notice of the subject.

The root of the prize system is found in the ancient doctrine that any person might seize to his own use goods belonging to an alien enemy; and this right extended to captures on the sea. This early doctrine has held its place, with greater or less modifications, in the admiralty codes of all maritime nations, and is now a prominent subject of international law, to which it properly belongs. In course of time it became an established rule, under the law of nations, that the property captured would not vest in the captors without adjudication and condemnation by a prize court, the captors in the meantime holding the property in trust for the parties to whom it should be awarded by the court. By another modification the prize vested in the sovereign of the nation to which the captors belonged; but the practice became general to distribute the proceeds of captured property among the captors "as a reward for bravery and a stimulus to exertion."¹

¹ 1 Cooley's Bl., pp. 100, 101, 399, 401; Benedict's Adm., §§ 306 *et seq.*;
1 Kent's Com., pp. 100 *et seq.*, 356.

Such, in brief, being the origin and character of prize law, the next inquiry relates to its administration. It will be remembered that the admiralty courts of England were held before the lord high chancellor, or his deputy, without a jury, having jurisdiction in admiralty and maritime causes, including prize cases, and proceeding according to the methods of the civil law. Appeals from these courts in ordinary cases lay to the king in council, as did also appeals from the vice-admiralty courts in America and other British colonies. Appeals from the colonial courts might also be taken to the courts of admiralty in England. But in cases of prize vessels taken in time of war, in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prizes, the appeals lay to certain commissioners of appeals consisting chiefly of the privy council, and not to "judges delegates."¹

Under the government of the United States, the disposition of prizes, and the treatment of prize cases, are regulated by acts of congress.²

In the United States there are no admiralty courts, *eo nomine*; but there is maritime law, whose administration is committed to established courts of other names and other functions, which, when sitting in admiralty causes, including prize cases, are called admiralty courts. By the federal constitution, as we have seen, the judicial power of the United States "extends to all cases of admiralty and maritime jurisdiction." By force of this provision, under judicial construction and congressional legislation, exclusive exercise of this power in certain classes of admiralty and maritime causes is confided to the dis-

¹ 1 Cooley's Bl., p. 68.

² R. S. of U. S. (Bout. ed.), §§ 1430, 4613-4651; Sup. to Id., §§ 12, 903; Benedict's Adm., §§ 306, 509-512.

strict, circuit, and supreme courts of the United States; while in other cases the state courts may take cognizance.¹

§ 88. **Torts and crimes.**— It has already appeared incidentally in the foregoing pages² that admiralty courts have jurisdiction of torts and crimes. But a more direct and specific statement of this jurisdiction may be helpful to readers unacquainted with admiralty jurisprudence. It may be stated generally that courts of admiralty have always had cognizance of all cases of damage from civil torts and injuries committed on the sea, or on waters of the sea where the tide ebbs and flows. It has been forcibly and plausibly said, however, that “it may be doubted whether the civil jurisdiction, in cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels to which the admiralty jurisdiction, in cases of contract, appertains. If one of several landmen bathing in the sea should assault or imprison or rob another, it has not been held here that the admiralty would have jurisdiction of the action for the tort.”³

The admiralty also has jurisdiction of maritime crimes and misdemeanors. The judicial power vested in the general government in “all cases of admiralty and maritime jurisdiction” embraces criminal as well as civil cases; and its exercise by that government is intrusted

¹ *Ante*, § 85; Benedict's Adm., §§ 315, 316, 320, 327 *et seq.*, 509–512, 578, 579–598, 315, 317; 1 Kent's Com., pp. 100, 104, 352–360; Pom. Munic. Law, § 173.

² *Ante*, § 84.

³ Benedict's Adm., §§ 308–312, and cases there cited; Dunlap's Adm. Prac. 403, 409; 2 Story on Const., §§ 1663–1674; 2 Cooley's Bl., pp. 105–108.

to the United States courts by the constitution; while the same classes of maritime cases, not within the exclusive jurisdiction of the federal courts, are within the cognizance of the state courts within their respective spheres.¹

In the trial and punishment of admiralty and maritime criminal offenses, in addition to the acts of congress above referred to, there are certain constitutional requirements which must be observed:

First. "No person shall be held to answer a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."²

Second. "The trial of crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may, by law, have directed."³

Third. "In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses, and to have the assistance of counsel for his defense."⁴

§ 89. Sources of our admiralty and maritime law.—
From the early ages of the world to the present time

¹ U. S. Const., art. III, sec. 2, and acts of congress cited *ante*, § 85.

² Art. V, amend. to U. S. Const.

³ U. S. Const., art. III, sec. 2.

⁴ Amend. of the U. S. Const., art. VI. And see Benedict's Adm., §§ 570-572; 1 Kent's Com., pp. 359-365; Pom. Munic. Law, §§ 45, 172, 173.

men have gone "down to the sea in ships," and done "business in the great waters;" a business unlike that of the land. And, as the land has had laws adapted to the government of its affairs, so has the sea. All commercial nations have had their maritime codes, adjusted to existing conditions in time and place. A brief historical summary of the principal maritime codes of the past has been herein given.¹ All of these codes, and others of which any record remains, supplemented by the learning and wisdom of learned jurists, found in commentaries and judicial records, have contributed to the admiralty and maritime jurisprudence of the United States. Our system, also, like its predecessors, is largely indebted for its principles and practice to the Roman or civil law, which prevailed in the countries from whence emanated the maritime codes to which reference has been made.² We are less indebted to the mother country for our admiralty and maritime law than for our body of common law, by reason of the subordinate and restricted condition of its admiralty jurisdiction at the time of the American Revolution; even the American colonial courts then having a more comprehensive admiralty jurisdiction than did the admiralty courts of England.³

§ 90. Subjects of admiralty and maritime law.—We have seen already that admiralty causes are controversies arising out of the navigation of the sea and other public waters; and that admiralty courts are those which have cognizance of maritime causes.⁴ It has further appeared that, stated generally, admiralty jurisdiction embraces

¹ *Ante*, § 83.

² *Benedict's Adm.*, §§ 5, 351, 357; *Bro. Civ. & Ad. Law*, 34; *ante*, § 83.

³ *Benedict's Adm.*, §§ 111-113; *ante*, § 86.

⁴ *Ante*, § 82.

contracts, torts and crimes pertaining to the realm and navigation of the sea;¹ but a supplemental notice of the leading subjects of admiralty cognizance may be of interest, and perhaps useful, to a class of readers. It will be borne in mind that all subjects of admiralty and maritime law relate in some way to ships and maritime navigation; and that "ship" is a general term, equivalent in the general law to vessel, which is defined "a locomotive machine adapted to transportation over rivers, seas and oceans."² And further, that in the purview of admiralty law, any floating craft upon the sea or other public waters is a vessel within the foregoing definition, whatever its size, shape or name, or in whatever employment engaged, or by what motive power impelled, whether by wind, steam, electricity, compressed air, liquid air, or some force awaiting discovery.

Briefly stated, the leading subjects of admiralty law are the following, viz.:

1. *Ownership and use of the vessel.*—Under this head many important questions arise for judicial settlement. One or more persons may become the owner or owners of a ship by building it at their own expense, by purchase or by capture; and where the ownership is by two or more, their relation to each other may be that of part-owners, partners, joint tenants or tenants in common. Each of these relations has its own peculiar law, differing more or less from either of the others; and, all told, presenting a variety of questions for admiralty cognizance, some by suits *in personam*, and others by proceedings *in rem*. And where there are several owners, the use and control of the vessel often leads to dispute and litigation.

¹ *Ante*, §§ 84, 88.

² Benedict's Adm., § 215.

2. *Seamen's wages*.—Disputed claims for seamen's wages are of frequent occurrence, and often reach the admiralty courts for adjudication. The term "mariner," used often interchangeably with seaman, is very comprehensive, including all persons employed on board ships during a voyage to assist in their navigation or preservation, or to promote the purposes of the voyage. Masters, mates, sailors, surveyors, carpenters, coopers, stewards, cooks, cabin boys, kitchen boys, engineers, pilots, firemen, deck hands, waiters—women as well as men—are mariners.¹ These various servitors have their rights, which, if denied or violated on board, will be enforced and redressed on shore, in a court of admiralty.

3. *Wharfage and dockage*.—Claims against the owners, master, and the ship itself, "for the use of the wharves, docks or piers, during the building, fitting, forwarding, supplying, loading and unloading, and repairing of a vessel," are the subjects of admiralty jurisdiction; and this, even when the vessel is lying at a distance from the wharf, dock or pier, and the latter are used temporarily for boats or cargo.²

4. *Contracts of affreightment*.—Agreements for the carriage of persons or property are contracts of affreightment, whether written or oral, express or implied, and are within the admiralty jurisdiction. When the contract is written it is termed a bill of lading. If the agreement to carry goods or passengers be not faithfully performed and damages ensue, the ship, master and owners are liable therefor, the ship in a proceeding *in rem*, and the master and owners in a suit *in personam*. And

¹ Benedict's Adm., § 278; Dunlap's Prac. 59.

² Benedict's Adm., § 283.

on the other hand, for non-payment of freight the master and owners may proceed in admiralty against the goods *in rem*, or against the party liable for the freight *in personam*, for its recovery.

It may be noted in this connection that a ship, or some defined portion of it, is sometimes rented for a voyage at a stipulated sum in gross as compensation, or for so much a ton for a specified period; in which case the contract is usually denominated a charter. When not in writing, however, it is not, properly speaking, a charter, although so called. When not under seal it is usually called a memorandum of charter. The familiar term "charter-party" is a deed in two parts. The admiralty has jurisdiction over this class of cases.

5. *Pilotage*.—The admiralty also has cognizance of questions concerning pilotage. Pilots are of two classes: first, an officer serving on board the ship during its voyage and having charge of the helm and the ship's course; the second is a person taken on board at a particular place to guide the ship through some difficult and dangerous part of its way, or from or into port,—a service often requiring much skill and experience. In the first-named class of cases the pilot is simply a mariner, with the same rights and remedies as other mariners. In the second class, the qualifications for the service being exceptional and the responsibility of the pilot great, he is entitled to special consideration by the admiralty when competent and faithful in the discharge of his duties; especially as he is subject to degradation and punishment when his incompetency or carelessness causes injury to person or property. To enforce compensation for his services, the pilot may proceed *in rem* against the ship, or *in personam* against the master or owner.

6. *Maritime liens*.—The emergency sometimes occurs that a ship on its voyage, when at a point far distant from its owners and with no means of timely communication with them, requires supplies or repairs; the master, in such case, if he lack the necessary funds for the purpose, has full power as agent of the owners to borrow money on their credit for the requisite supplies or repairs, and to hypothecate the vessel as security.

From the nature and exigencies of maritime commerce, there are numerous cases in which the contracts, and torts, even, of the master will effect a lien upon the vessel without formal hypothecation. Maritime liens may be created by implication or by operation of law.

It should be noticed that maritime liens differ from common-law liens in the important particular that the former do not, as do the latter, depend for validity upon possession by the lienor.

7. *Bottomry, and respondentia bonds*.—“Bottomry bonds are those on which a sum of money is loaned for a particular voyage on the security of the ship—the ship and freight—or the ship, freight and cargo, on condition that if the voyage be performed safely, the money and interest shall be paid; and if she do not arrive, but is lost by a peril of the sea, then none shall be paid.”¹

Respondentia bonds are like the last named, with the exception that they are made on the security of the cargo alone instead of the ship, and lack the element of maritime risk, the owner being personally responsible.

All questions connected with, or growing out of, maritime liens of every variety, are subjects of admiralty cognizance.

8. *Average contribution*.—In the perils of navigation it sometimes becomes necessary to lighten the ship's burden

¹ Benedict's Adm., § 292.

by throwing overboard a portion of the cargo in order to save the residue. In such case, all the freighters whose property is thus saved are liable to contribute, respectively, in proportion to their goods saved, to make up the loss of those whose goods have been sacrificed for the common benefit. This constitutes what is known as average contribution, which is eminently equitable and just.

There are also other cases of jettison of cargo, in which the rights of parties concerned become the subjects of admiralty adjustment.

9. *Salvage*.—This subject of admiralty jurisdiction is thus concisely and accurately defined:¹ “Salvage is the compensation that is to be made to persons by whose assistance a ship or its lading has been saved from impending peril, or recovered after actual loss. It is of two kinds: military salvage, consisting of recapture or rescue of a ship from an enemy; and civil salvage, consisting of saving in cases of property derelict and shipwrecked, or in peril.”

10. *Torts*.—In addition to what has been said on the subject of torts,² it is pertinent to state in this connection that there are numerous torts incident to navigation, all of which are within the admiralty jurisdiction. These may consist of assaults or other direct personal injuries by the officers and crew upon each other, or upon the passengers, tortious injuries, direct or indirect, to the ship or freight; and, in short, any or all the torts known to society on the land, differing in character only as circumstances differ, all being the tainted outgrowth of the same corrupt root.

The foregoing specifications embrace only the leading

¹ Benedict's Adm., § 300.

² *Ante*, § 88.

subjects of admiralty and maritime law, in their main features, all that the prescribed limits of this work will permit; but enough to answer the purpose in view, to give the reader an idea of the broad and important field of admiralty jurisdiction.

§ 91. **Admiralty procedure and practice.**—The procedure and practice in courts of admiralty are peculiar, differing widely from those of the courts of law, and having nearer resemblance to the procedure and practice in courts of equity. A discussion of this branch of the general subject of the present chapter is not consistent with the plan and scope of this work. Full treatment in detail of the methods of procedure, and the rules of practice, including forms, are readily accessible to all who may desire the knowledge.

CHAPTER X.

INTERNATIONAL LAW.

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 5. Contraband of war.
 6. The right of search and seizure.

§ 92. **Definition.**—International law consists of the principles and rules established for the government of nations in their intercourse with each other. There are social and commercial relations among civilized nations, as well as between the individuals of a nation; and, in the present imperfect condition of humanity, the former, no less than the latter, require binding rules for the regulation of their intercourse. The definition formulated by Dr. Wheaton, a recognized authority on international law, is the following: "International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant with justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent."¹ Of international law, Chancellor Kent says: "By this law we are to understand that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other. The faithful observance of this law is essential to national character, and to the happiness of mankind."² Blackstone writes thus: "The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world in order to decide the disputes, to regulate the ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent nations and the inhabitants belonging to each. This general law is founded upon this principle, that different nations ought in time of peace to do each other all the good they can, and in time of war as little harm as possible without prejudice

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 26.

² Kent, Com. (5th ed.), p. 1.

to their own real interests. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nations and reason being the only one in which all the contracting parties are equally concerned, and to which they are equally subject.”¹ Other definitions to the same effect, though differing somewhat in phraseology, might be cited; but the foregoing are sufficient to convey a correct idea of the character and office of international law.

§ 93. Public and private international law.—A distinction must be recognized between public and private international law. The former deals with the relations and the rights and duties of independent sovereign nations and states between and towards each other; the latter comprises the relations, rights and duties of the subjects of different nations or states between and towards each other. This involves the power of the nation or state to act upon the persons or property within its own territorial limits and frequently presents questions of much importance for adjudication.²

¹ 2 Cooley's Bl. (3d ed.), p. 66. And see *Wilson v. McNamee*, 103 U. S. 374; *Hogsheads v. Boyle*, 9 Cranch, 198; Whart. Crim. Law, 130.

² See Story, Conf. Laws, §§ 18-23; *Id.*, §§ 464, 376-382; Whart. Conf. Laws, § 585; Cooley, Princip. Const. Law, p. 178 *et seq.*; *Hoyt v. Sprague*, 103 U. S. 630; *Harvey v. Richards*, 1 Mason, 381; *Oakey v. Bennett*, 11 How. 33; *Still v. Worswick*, 1 H. Black. 665; *Bank of Augusta v. Earle*, 13 Pet. 519; *Ennis v. Smith*, 14 How. 400; *Despard v. Churchill*, 53 N. Y. 192.

The rules of private international law are summed up as follows: "1. Every nation possesses an exclusive sovereignty and jurisdiction within its own territory as to all property, persons and contracts. 2. No state can by its laws directly affect or bind property out of its territory, or persons not residents therein. 3. Whatsoever force and obligation the laws of our country have in another depends solely upon the laws of the latter, that is, by the comity exercised by it."¹

§ 94. **Origin of international law.**—Distinguished writers have entertained conflicting theories in respect to the origin and foundation of international law; but the foregoing quotations and authorities² express the writer's views, and also, it is believed, the consensus of opinion among leading publicists of the present day. As a community of independent nations have no common legislature or judicial authority to establish or determine the law by which their reciprocal relations shall be governed, it is obvious that, by international law or its equivalent, the law of nations, is not meant a formal or written code, but rather a body of unwritten principles and rules founded on reason and justice, and adopted by common consent, which are suited to the relations, conditions and purposes for which they were established. There are, it is true, written treaties on various subjects between independent nations which, as between the parties thereto, have the force of law upon the matters to which they relate; but these compacts do not constitute in a comprehensive sense the common law of nations, nor release the parties thereto from the general obligations of that law. Conventions between particular independent na-

¹ Story, *Conf. Laws*, §§ 18-23; *Hoyt v. Sprague*, 103 U. S. 630.

² *Ante*, § 92.

tions may, however, and do in fact, contribute to the body of international law, by their general adoption, as furnishing wise and just rules for guidance in like cases. They serve, moreover, as evidence of the law of nations in cases of doubt or of novel impression. And, indeed, a line of similar treaties or compacts in a particular class of cases may grow into a standing rule of international law.¹

§ 95. **Sources of international law.**—The great community of independent, sovereign nations, having no common legislature or judicial tribunal to make and administer a code of laws for the government of their relations and commerce with each other, we look in vain to the municipal law, written or unwritten, of any one country or state as the fountain of international law, but must seek its sources in other directions. In our search, we naturally first consult the works of learned authors who have made the subject of international law a special study, and given us the result of their unwearied and discriminating investigations in all the fields of knowledge available. The text-books of these writers are indispensable to students of international law, to members of the legal profession, and of great value to all who for any reason may require a knowledge of this interesting and important branch of jurisprudence. The value of reliable text-books is often greatly under-estimated. Rarely does the reader appreciate the amount of patience, research, unwearied labor and discriminating study which the construction of such a book may have cost the author. It is a wise as well as a pithy maxim: "Let him who would thoroughly understand a subject write a book

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 27 *et seq.*; Woolsey, Int. Law, §§ 101, 103; Foster v. Neilson, 2 Pet. 314.

on it." There is some truth in that quaint old proverb: "Publishers drink their wine from authors' skulls."

While treaties between particular nations do not, in themselves, constitute the general law of nations, they assist in acquiring a knowledge of that law; and, indeed, when numerous and successive, embodying the same rule for like cases, they may reasonably be regarded as furnishing some evidence that the rule thus adopted is an appropriation from the international code. Madison wrote:¹ "Treaties may be considered under several relations to the law of nations according to the several questions to be decided by them." . . . "They may be considered as simply repeating or affirming the general law; they may be considered as making exceptions to the general law, which are to be a particular law between the parties themselves; they may be considered as explanatory of the law of nations on points where its meaning is otherwise obscure or unsettled, in which they are: first, a law between the parties themselves, and next, a sanction to the general law, according to the reasonableness of the explanation, and the number and character of the parties to it; lastly, treaties may be considered as a voluntary or positive law of nations."

Marine ordinances of nations which prescribe rules for their commissioned cruisers and prize courts are prominent among the sources of international law. These ordinances may properly be regarded as evidence, not only of the practice of those nations in the matters to which they relate, but also of the views of their jurists and statesmen as to what the law of nations is, or ought to be, in respect to those matters. Manifestly, the value of such ordinances for the purposes indicated depends upon

¹ Madison, *Examination of the British Doctrine, etc.*, p. 39.

their number among the different nations; their longer or shorter continuance in force, and their acceptance as authority, whether general or limited.

Among the sources of the law of nations we must not overlook, in passing, the adjudications of international tribunals, such as boards of arbitration and prize; and especially the judgments of mixed tribunals, created by the action, respectively, of the contending parties, and in which, presumably, the conflicting contentions of litigants were heard and determined.

Valuable assistance in this quest is available in the written opinions of learned jurists, given officially and confidentially to their own governments. These opinions, it may safely be assumed, are the result of a thorough knowledge of the principles and rules of international law as established and understood at the time of their rendition; and that they are given only after consideration of the questions involved, and under the highest incentives to personal, professional and official honesty. Such opinions have great weight, and are entitled to most favorable consideration.

One other source of international law worthy of mention may be found in the History of Wars; their commencement, conduct, and all the transactions thereto relating, including diplomatic correspondence and treaties of peace.

With such sources of knowledge available, and an unselfish desire for the triumph of right and justice, little difficulty would be found in effecting an amicable adjustment of all international controversies without resort to the bloody and savage arbitrament of war! But, should a case arise in which, from selfish interest or other cause, an agreement could not be effected by diplomacy,

the avenue to peace would always be open through arbitration.¹

§ 96. **Subjects of international law.**—Independent nations or states, as political units, constitute the subjects of international law. The words *nation* and *state* are often used indifferently and interchangeably with the same intended significance; but this is not a strictly accurate use of terms, since the meaning of the words, in some connections, involves minor differences. The inaccuracy, however, is of little, if any, importance, and will be ignored in the present discussion. A state—or nation—is defined by publicists thus: “A body politic or society of men united together for the promotion of their mutual safety and advantage, by the combined efforts of their joint strength.”² Mr. Wheaton, in adopting this definition, properly excludes corporations, public or private, created by the state itself, under whose authority they exist, whatever may be the purposes for which the individuals composing them may be associated.³

It must be added that it is not every combination of men, with whatever claims or assumption, that constitutes a nation or state *de jure*, entitling it to recognition as such by the community of nations or to a place in international law. Savage hordes may combine for plunder or other unlawful purposes, and for protection in the execution of such purposes, without becoming a nation.

¹ See Lawr. Wheat. Int. Law (2d Ann. ed.), pp. 27–31; Story, Conf. Laws, §§ 18–23; Hoyt v. Sprague, 103 U. S. 630; 1 Cooley, Bl. (3d ed.), p. 42; 1 Kent, Com. (5th ed.), p. 1 *et seq.*

² Cic. de Rep. I, i, § 25; Vattel, Law of Nations, § 1.

³ Lawr. Whart. Int. Law (2 Ann. ed.), p. 22. And see Cooley, Princip. Const. Law, p. 20; Story, Const., § 207; Langford v. Monteith, 1 Idaho, 617; Cherokee Nation v. Georgia, 5 Pet. 52; Texas v. White, 7 Wall. 720.

Ambitious and misguided men may renounce allegiance to their lawful government without just cause, set up for themselves a separate government with all the forms of sovereignty, without possessing the conditions or attaining the dignity of nationality. An uncivilized or partially civilized people, led by an ambitious and unscrupulous adventurer, may assume the attitude of sovereignty, repudiate the suzerainty to which they are rightfully subject, and yet knock in vain for admission to the family of nations. "A state," says Professor Cooley,¹ "is either sovereign or dependent. It is sovereign when there resides within itself a supreme and absolute power acknowledging no superior; and it is dependent when in any degree or particular its authority is limited by an acknowledged power elsewhere. It is immaterial to this definition whether the supreme power reposes in one individual or one body or class of individuals, or in the whole body of the people; whether, in other words, the government is a monarchy, an aristocracy, a republic or a democracy, or any combination of these; for the form only determines the methods in which sovereign power shall be exercised."²

Sovereignty, the supreme power by which a state or nation is governed, may be co-existent with the society of which such body is composed, or it may be acquired through peaceable separation from one political corporation, and the creation of a new independent state or nation. Sovereignty may also be acquired in other ways; as, for example, by conquest or revolution; but whatever its origin it consists of two kinds, *internal* and *external*, according to its relations and functions. The former is

¹ Cooley, Princip. Const. Law, p. 20.

² Vattel, b. 1, c. 1, § 2; Chapman on Government, 137; Hallook, Int. Law, 65.

that which inheres in the people of a single state or nation, or is vested in the ruler thereof by its organic law, and whose governmental functions are confined to the affairs of its own political body. The latter refers to the relations, rights and duties of independent nations as political units in and members of the great family of nations. With the internal sovereignty of one nation and its exercise other nations have no direct concern; but in external sovereignty a nation sustains relations to other nations, and is subject to the dominance of international law. By independent nations, as used in the law of nations, is meant simply exemption from rightful interference in its internal affairs by other nations. But while independent nations have no right under ordinary circumstances to intermeddle with the internal affairs of other independent nations, they have a voice in respect to the admission of other members into the recognized community of nations. And once admitted as a constituent member of the national family, whatever may be its internal condition, or bearing towards other members of the family, orderly or disorderly, peaceable or contentious, in contemplation of international law it remains a member, retaining all its rights and privileges as such until its sovereignty ends with its dissolution.¹

§ 97. International law in time of peace.—In an outline survey of international law, it would be impossible, were it desirable, to fully discuss the subject in all the phases and applications of its principles and rules. It is the intention of the writer, however, to give a correct and comprehensive view in outline of the whole field of

¹See Lawr. Wheat. Int. Law (2d Ann. ed.), pp. 31 *et seq.*; Woolsey, Int. Law, § 36; State v. Young, 29 Minn. 536; Cic. de Rep. I, i, § 25; Vattel, Prelim., § 1 *et liv.*, ch. I, § 1; Burlamqui, Droit naturel, tom. II, part 1, ch. 4.

international law; and in so doing it will be convenient to consider the subject in its relations, respectively, to the two general conditions of peace and war. Each condition has its own peculiar principles and rules, and their separate statement, it is believed, will tend to prevent confusion in the mind of the reader, especially one to whom the subject is new. The present section will present, in brief, the rights and duties of nations in time of peace.

1. *The right of self-preservation.*—This right is fundamental, absolute, and essential to the life of a nation. With nations, not less than with individuals, self-preservation is both a right and a duty; a right as it respects the nation itself; and a duty to its subjects of the most important and imperative character. This statement requires no elaboration. It is plain, moreover, that the right of self-preservation embraces all incidental and subordinate rights essential to the preservation and full enjoyment of the foundation right.¹

2. *The right of self-defense.*—Prominent among the rights incidental to the right of self-preservation is that of self-defense. This right includes not only the right and duty of resistance when unjustifiably attacked, but also the right to take precautionary measures for averting apprehended aggression. The limitations of this incidental right are not and cannot well be distinctly defined; but a nation fearing hostile action by another nation must decide for itself what precautionary measures to adopt, assuming the risk incurred by a resort to action which may be deemed unjustifiable by disinterested nations. Circumstances may dictate early preparation for defensive action by a nation fearing hostilities by an un-

¹ Kluber, *droit des Gens. Moderne de l'Europe*, § 36; Lawr. Wheat. *Int. Law* (2d Ann. ed.), p. 115.

friendly power, such, for example, as the erection of fortifications, increasing the efficiency of its army and navy, and other war-like preparations. If a deadly blow be aimed at an individual or a nation, the imperiled party need not wait for the blow to fall, but may rightfully, if possible, paralyze the arm that is raised to strike. Not only what an unfriendly nation does, but what it intends to do by certain equivocal acts, innocent in themselves, but wrongful in their animus and ulterior purpose, may be inquired into by the menaced nation as a measure of self-defense. Diplomacy may clear up the situation and establish friendly relations between the parties; otherwise the fears of the inquiring party may be justified, leaving it free to adopt such measures of self-defense as the exigency may demand.¹

3. *The right of intervention or interference.*—While it is true, as already stated,² that, in the contemplation of international law, the great community of nations is composed of separate, independent nations, no one in general having a right to interfere with the internal affairs of another, it is equally true that to this rule, as to most general rules, there are some exceptions. But such exceptions are of rare occurrence. Many interventions in the past have been inspired by unworthy ambition, jealousy, lust of power, or an uncurbed passion for national aggrandizement.

Stated generally, it is the right of an independent nation to expand its territory and augment its wealth and power in all lawful ways, and by any innocent, available means. This general statement embodies, among other things, the acquisition of new territory, adjacent or re-

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), pp. 115, 116.

² *Ante*, §§ 94, 95.

mote, the encouragement of its industries, the extension of its commerce, the increase of its military and naval forces, the interests of navigation and freedom of intercourse with foreign nations. The abridgment of these natural rights in their full enjoyment is justifiable only when their exercise interferes injuriously and unjustly with the rights and powers of other nations. Cases have occurred, however, and may again occur, in which the increase in a nation's military and naval forces, its overshadowing power and aggressive spirit, and its insatiable thirst for national aggrandizement, become an alarming menace to the life or rights of another nation. In such a case the imperiled nation may rightly intervene in self-defense, and arrest by remonstrance, or force if need be, the measures which reasonably excite alarm.¹

So, also, interference on the call of humanity may be not only just, but highly commendable. Justice and humanity are elements of international, as well as of municipal, law; and their claims cannot be rightfully or safely ignored. As individual members of a state or nation may justly interfere for the protection of oppressed fellow subjects, so may a nation intervene for the relief of oppressed subjects of another state or nation. In either case it is the answering call of humanity to the appeal of oppressed humanity. If a nation be unable or unwilling to protect its subjects in the enjoyment of their rights, or the nation itself, through the tyranny or maladministration of its rulers, becomes the oppressor of its subjects, then other nations more just and humane may interfere for their relief. But to justify interference on the ground of humanity, the necessity for it must be clear and imperative, and the response clear from selfish motives.

Another case of justifiable intervention is where a na-

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 116 *et seq.*

tion tenders its good offices for the peaceable settlement of the internal dissensions of another nation. Such tender to either party may properly be made in the interests of peace without offense to the other party, being sanctioned by the usage of nations; and if accepted by the contending parties, the friendly nation is authorized to intervene as a peace-maker. The parties are not bound to accept such friendly intervention, unless obliged to do so by force of an existing compact or treaty.¹

4. *Right of exclusive civil legislation.*—It is an established principle of international law that every independent nation has the exclusive authority of legislation in all matters directly pertaining to the personal rights, duties and relations of its own subjects; and also in respect to all property, real, personal, or mixed, situated within its jurisdictional territory, whether the title be in its own citizens or in aliens. This rule is simple, and easy of application; but citizens of one state or nation may have title to property situated in another state or nation; or they may be interested in contracts made, or testaments executed, in another jurisdiction; and these conditions often present questions for adjudication of considerable difficulty. Full equipments for the mastery of these questions would require a knowledge of the law of contracts, and other branches of law involved, including the conflict of laws. Treatment of these subjects would be inconsistent with the plan and scope of this work, and far exceed its assigned limits. It may be said in passing, however, by way of emphasizing what has been already said in effect, that a sovereign nation or state has the control of all real and personal property within its terri-

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 117 *et seq.*; pp. 140, 613;
1 Kent, Com. (5th ed.), p. 23 *et seq.*

torial limits, jurisdiction and control of the inhabitants of such territory, whether native or foreign born, and jurisdiction of all acts and contracts done or made within its territorial limits. Further, that no state or nation can, by its own legislation, regulate or control property situated in a foreign state or nation. As independent nations are equal in sovereignty, and often have diverse laws upon the same subjects, it is plain that the foregoing rules are essential to the peace of nations.¹

The doctrine that every sovereign state and nation has exclusive jurisdiction over all persons and property within its territorial domains is qualified by the rule that the state and capacity of a citizen, once judicially determined, adheres to him thereafter wherever he may go, or in whatever country he may reside. The prominent subjects embraced in this rule are citizenship, legitimacy, idiocy, lunacy, bankruptcy, and marriage and divorce. To this extent and effect the laws of a particular state or nation are operative beyond its territorial limits.

5. *International comity*.—This is well defined as “The basis upon which an independent sovereignty applies within its own territory the laws of another sovereignty, in a matter as to which the latter or its citizen is concerned.”²

International law does not make it obligatory upon any independent nation to recognize and apply within its own territory the laws of another nation; but the mutual interest and convenience in their intercourse with each other require the observance of this courtesy, which, being voluntary and reciprocal, involves no loss of dignity or power. The propriety and importance of this

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), pp. 132 *et seq.*, 172 *et seq.*

² Story, Conf. Laws, §§ 28, 33-38.

comity, and its adoption by the community of civilized nations, invests it, practically, with the force of law.¹

A common and familiar example of international comity is "the respect which tribunals entertain for the decisions of each other, in the determinations of questions involving reference to extraterritorial law," appropriately denominated "judicial comity." This exercise of comity is quite generally, if not universally, approved by the judicial tribunals of civilized nations.²

A reference to the principal subjects embraced in judicial comity is all that the limits and plan of this work will permit. These subjects are founded in our law books under the several names or titles, *lex loci rei sitæ*, relating to real property; *lex domicilii*, relating to personal property; *lex loci contractus*, place where a contract is made; state or capacity of a person; bankruptcy, and the title of assignees therein; validity and effect of wills and testaments; and marriage and divorce.³

Another application of international comity is the exemption of a sovereign from local jurisdiction, both civil and criminal, while within the territory of another nation in time of peace. While in the territory of another sovereignty with the consent of the latter express or implied by the absence of any prohibition, the mantle of his own

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 162; Lawrence's Appendix to Id., No. I, p. 891.

² And. Law Dic., title "Comity," p. 197; Lawr. Wheat. Int. Law (2d Ann. ed.), p. 160 *et seq.*; *Cowell v. Saratoga Springs Co.*, 100 U. S. 52; *Memphis, etc. R. Co. v. Alabama*, id. 581, 585; *Fairfield v. County of Gallatin*, id. 52.

³ Lawr. Wheat. Int. Law (2d Ann. ed.), pp. 164-168, 172, 177, 179, 187; *Fairchild v. County of Gallatin*, 100 U. S. 52; *Carroll County v. Smith*, 111 id. 563; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Wright v. Nagle*, 101 U. S. 793.

jurisdiction and official dignity covers and protects him. Like exemption extends to ambassadors and other public ministers of an independent nation while in foreign territory. By a convenient fiction of law the residence of the official minister in the country to which he is accredited is deemed a continued residence in his own country. The exemption extends to the wife and family, servants and suite of the official, the house where he resides, and personal property connected with his mission; but not to property for trade or other purposes. The exemption in question being a favor, and not a right, unless conferred by compact, may be forfeited by abuse. Any conduct by a foreign minister hostile or injurious to the nation of his official residence will deprive him of his shield of exemption and subject him to the local jurisdiction, civil and criminal.¹

It is a general doctrine of international law that every sovereign nation is independent of every other in the exercise of its judicial power. But this general law has its exceptions; for example, in cases of compacts with other nations by which it parts with certain portions of its judicial power during the life of such compacts; and in cases where, by virtue of international comity, the municipal laws of another nation operate within its territory as above shown.

International comity also permits the army or fleet of an independent nation to pass through or over the foreign territory of a friendly power without molestation. In the absence of express prohibition the ports of friendly nations are considered as open to the armed and commis-

¹ Bynkershoek, de Foro Legat, cap. III, § 13; cap. IX, § 10; Westlake, Riv. Int. Law, § 138, p. 120; Opinions of Attorneys-Gen., June, 1794, vol. I, p. 96; Id. 1797, vol. I, p. 81; 1 Kent, Com. (5th ed.), pp. 94 *et seq.*, 38; Lawr. Wheat. Int. Law (2d Ann. ed.), pp. 198, 394, 398; Lawr. Wheat. Int. Law (2d Ann. ed.), pp. 224-232.

sioned vessels of each other. This freedom is sometimes granted by treaty, in which case it is not due to comity. But private vessels, when within the territory of another nation, are not exempt from the local jurisdiction, unless by express compact, and to the extent therein provided.¹ This freedom of vessels, however, does not extend to acts by them, or by their officers and crew, which are hostile to the nation and threatening to its security. Nor does the freedom of public vessels extend to their prize goods taken in violation of the neutrality of the country into which they are brought.²

6. *Public and private property.*—An independent nation has the exclusive right to its own property, both public and private. To the former it has an *absolute* title, exclusive of other nations and of its own citizens also. To the latter — consisting of the property of its subjects — it has an absolute and exclusive title as against other nations, and a *paramount* title in respect to its own citizens whose title is subject to the right of *eminent domain*, which is inherent in the nation or state.³ National proprietary rights of territorial domain are founded upon title acquired by discovery, conquest, concession, or prescription established by occupancy. Real or fancied violations of these rights have caused many bitter controversies and sanguinary wars among the nations of the earth, and “the end is not yet.”⁴

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 190 *et seq.* and examples there cited; 1 Kent, Com. (5th ed.), p. 34 *et seq.*; The Schooner Exchange v. McFadden et al., 7 Cranch, 135-147.

² The Santissima Trinidad, 7 Wheat. 352.

³ And. Law Dic., title “Domain;” Kohl v. United States, 91 U. S. 371-74; Mississippi, etc. Boom Co. v. Patterson, 98 U. S. 406.

⁴ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 303 *et seq.*; Rutherford's Inst. National Law, vol. II, ch. 9, § 6; Rhode Island v. Massachusetts, 4 How. 639.

7. *Consuls and consular jurisdiction.*—The character and functions of these officials are thus briefly defined by Chancellor Kent: "Consuls are commercial agents appointed to reside in the sea-ports of foreign countries, with a commission to watch over the commercial rights and privileges of the nation deputing them.¹ The consular service includes several official grades, as "consul-general," "deputy consul," "consular agent," "vice-consuls" and "vice-commercial agents;" but the word "consul," in a broad general sense, includes all consular officials of whatever grade, and is sufficient for the present purpose. No nation is bound to receive a foreign consul, unless by force of a compact; but the importance of consular functions renders their appointment and reception quite general among commercial nations. On presentation of a duly authenticated commission at a foreign court, they receive an *exequatur*, which accredits the agent, and clothes him with authority to enter upon the discharge of his official duties. These officials, however, are not within the rule of comity which exempts the persons and property of public ministers from the local jurisdiction, civil or criminal. If guilty of illegal or offensive conduct, their *exequatur* may be revoked, and they may be punished by the local tribunals, or sent out of the country, at the option of the offended government.

The functions of a consul are principally those of an agent charged with the duty of watching over and protecting the rights, privileges and interests of his country and countrymen within the sphere of his consulate. The extent of his functions and jurisdiction depends upon the relations between his own country and that to which he is commissioned, founded upon compact or the common law of nations; but in all cases his duties are important,

¹ 1 Kent, Com. (5th ed.), p. 41.

and sometimes difficult and delicate, requiring the exercise of wisdom, prudence, tact, firmness and acquaintance with international law. At present, a consul is quite generally clothed with more or less judicial power over his own countrymen, within his consulate; which jurisdiction in some cases is limited to civil affairs, while in other cases it embraces certain grades of crime.

The foregoing general view of consular functions and jurisdiction is sufficient for the present purpose; and, with the authorities cited, will furnish full information upon the subject.¹

8. *Maritime territorial jurisdiction.*—The general doctrine on this subject is well stated by Mr. Wheaton as follows: "The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers and adjacent parts of the sea inclosed by headlands belonging to the same state. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon ball will reach from the shore, along all the coasts of the state. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation."²

There is no dispute among civilized nations, or publicists, in regard to the right of maritime territorial jurisdiction; but as to how far this jurisdiction extends from the shore presents a question of some difficulty. It is quite probable, as suggested by distinguished public writers, that the distance a cannon ball discharged from the shore

¹ 1 Kent, Com. (5th ed.), p. 4 *et seq.*; Lawr. Wheat. Int. Law (2d Ann. ed.), pp. 184, 187, 215 *et seq.*, 378, 430, 431, 1007; Coppel v. Hall, 7 Wall. 553; The Anne, 3 Wheat. 445, 446. For the laws of the United States on the subject, see R. S. of U. S. (Boutwell's 2d ed.) and Supplement; and Story, Const., §§ 1505-1624, 1658-1662.

² Lawr. Wheat. Int. Law (2d Ann. ed.), p. 320.

would reach was based on the assumption that it measured the limit of a nation's ability to maintain its maritime territorial right against hostile aggression. In the earlier ages of the world the maxim that "might makes right" was largely adopted as sound ethical doctrine. The time was when a marine league, or three geographical miles, measured the flight of a cannon ball sped seaward from the shore. Then the marine league and the range of the cannon ball were equivalents. Not so now, the two are far apart; the former remaining unchanged while the measure of the latter has largely increased; and to what length it may extend in the future no man can predict with certainty, without the power to limit the revelations of science and the achievements of inventive genius. Which shall be accepted as the measure of national maritime territorial jurisdiction, a marine league, which is always the same, or the flight of a cannon ball, the range of which is constantly changing? This question does not seem to have been definitively settled among the nations. Under the conditions above indicated, and in view of the differences to which the question has given rise in the past, it is very desirable that it should be set at rest by international agreement.¹

By reason of irregularities in coast-lines, caused by bays and other indentations and projections, it has become the general usage among nations to draw an imaginary line from one promontory to another as a basis from which to measure the marine league of maritime territorial jurisdiction. But this custom is held to be only applicable to small bays, and not to gulfs of great extent.

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 320 *et seq.*, p. 339 *et seq.*; 1 Kent, Com. (5th ed.), p. 25 *et seq.*; Church v. Hubbard, 2 Cranch, 234; The King v. Forty-nine Casks of Brandy, Haggard's Adm. Rep., vol. III, pp. 275, 290.

It should be noticed, in passing, that no nation can acquire title to the open sea as private property; the free use of the ocean for navigation and fishing is common to all mankind.¹

Intimately connected with the subject of maritime territorial jurisdiction is that of the exclusive right of fishery, which has given rise to grave international controversies. The general doctrine on this subject is that the right of fishing in the waters adjacent to the coasts of any nation, within its territorial limits, belongs exclusively to the subjects of that nation.²

9. *Jurisdiction over vessels on the high seas.*—It is an established doctrine of international law, that the jurisdiction of a nation extends to its vessels, both public and private, on the high seas when out of the territorial limits of any other nation. For example, the deck of an American vessel while on the high seas is American territory, and the vessel, its officers, crew, passengers and property, are all subjects of American jurisdiction, and entitled to American protection. This jurisdiction, however, is exclusive only so far as it respects civil rights, and violations of its own national laws. Offenses against the law of nations, such, for example, as piracy, not being crimes against any nation in particular, but against all nations, are subject to punishment in the competent courts of any nation where the criminal may be found, or carried, although committed on the high seas.³

¹ 1 Kent, Com. (5th ed.), p. 26.

² Lawr. Wheat. Int. Law (2d Ann. ed.), p. 323 *et seq.*

³ Vattel, liv. i, ch. 19, § 216; liv. ii, ch. 7, § 80; Rutherford's Inst., vol. ii, b. 2, ch. 9, §§ 8, 19; 1 Kent, Com. (5th ed.), p. 183 *et seq.*; U. S. Const., art. I, sec. 8; Story, Const., §§ 1157–1167; Lawr. Wheat. Int. Law (2d Ann. ed.), p. 209 *et seq.*; United States v. Smith, 5 Wheat. 161, 162; United States v. The Walek Adbel, 2 How. 232; Holland's Studies in International Law, p. 159.

10. *Exemption of vessels from the local jurisdiction in foreign ports.*—It is quite generally conceded that public armed vessels in the ports of a friendly foreign power are exempt from the local jurisdiction. This exemption is justified on the ground that such a vessel constitutes a part of the military force of her nation, is under the immediate command of its sovereign or supreme military power, and employed in matters involving the interests, and possibly the life, of that power. It might seriously affect the dignity and power of a sovereign to have his armed vessels subjected to a foreign jurisdiction; and hence it may reasonably be assumed, that when a nation freely admits war-ships of a friendly foreign nation to enter its ports, it is with the implied understanding that such vessels while there shall be exempt from the local jurisdiction.

But in respect to private vessels which enter a foreign port for commercial purposes, or other peaceful purposes, the same reasons for exemption from the local jurisdiction do not exist; and here, as always, where the reason ceases the rule ceases. So is it, also, in respect to foreign individuals who temporarily mingle freely with the citizens in business and social relations. By a convenient and friendly fiction, these vessels and persons are, *pro tempore*, home vessels, and native subjects, and hence the subjects of local jurisdiction.¹

11. *Visitation, search and seizure, and impressment.*—International law recognizes the right of a belligerent to stop a neutral merchant vessel on the high seas, go on board, examine her papers, and her cargo if necessary, to ascertain whether or not she is conveying hostile or con-

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 198 *et seq.*, and authorities there cited; Holland's Studies in International Law, p. 156 *et seq.*

traband goods. But this right does not extend to public commissioned vessels, nor to private vessels in time of peace, unless conceded by treaty. If evidence be found of a violation of neutrality law, in the carrying of enemy's property, or troops, or dispatches, or other contraband articles, the vessel may be seized and taken into port for adjudication by a prize court.¹

Intimately connected with the subject of visitation and search is that of impressment, which is the practice of forcibly taking from the visited vessel alleged deserters from the military or naval service of the visitor's nation, and other persons liable to duty in such service. The right and practice of impressment has naturally caused considerable controversy, and some bitterness, between nations. This is due to the fact that the sovereignty of independent nations in the inviolability of national vessels on the high seas is involved; and also to the offensive, reckless, and brutal manner in which the right has often been exercised in past times. Subjects of the nations whose vessels have been thus visited have been seized and forcibly deported to a foreign service or a prison.

This subject has especially interested Great Britain and the United States, leading to much earnest diplomatic discussion, and contributing in a large measure to the war of 1812. The contention of Great Britain was, that by force of English law the allegiance of her subjects is perpetual, entitling her to their service whenever required, and giving her the right to enforce that service, even to the extent of forcibly reclaiming them, even from the territory of independent foreign nations. The United

¹ 1 Kent, Com. (5th ed.), p. 152 *et seq.*; Vattel, b. 3, c. 7, sec. 164; The Maria, Rob. Adm. 287; The La Louis, 2 Dodson's Adm. 245; The Marianna Flora, 11 Wheat. 42; Woolsey, Int. Law, § 213; Holland's Studies in Int. Law, p. 124 *et seq.*

States, while tacitly conceding the authority of the perpetual-allegiance doctrine of English law, as between the crown and its subjects, and the right to enforce it within its own territorial limits, insisted that this right conferred no authority to invade foreign territory and forcibly take seamen from the vessels of other nations; invoking the well-established doctrine of international law that the deck of a vessel on the high seas is the territory of the nation to which such vessel belongs. The extreme claim of England was finally abandoned by that power, and it may now be regarded as the settled doctrine of international law that such right does not exist in time of peace.

This contention of the United States, as finally conceded by Great Britain, it will be noticed, does not affect the war right of a belligerent to visit and search a neutral merchant vessel, and even to impress therefrom deserters found on board.¹

12. *Rights of legation.*—The extensive commercial and political relations among civilized nations in modern times, together with the important and delicate questions respecting the balance of power, has led by common consent to the institution of resident permanent legations at foreign courts. The right of sending, and the obligation of receiving, public ministers may now be regarded as part of the international code. The duties of a public minister are not confined to the interests of his own nation, or the protection of his own countrymen, but extend to the subjects of all friendly nations, whose rights and interests in times of revolution, or in other excep-

¹ 1 Kent, Com. (5th ed.), p. 153 *et seq.*; Lawr. Wheat. Int. Law (2d Ann. ed.), pp. 208 *et seq.*, 257, 266; Woolsey, Int. Law, § 208; Webster's Works, 329, 335; Holland's Studies in Int. Law, 156 *et seq.*

tional circumstances, may require friendly aid. For the rules in detail pertaining to this subject, resort must be had to works devoted exclusively to international law.¹

13. *Extradition of criminals.*— This subject has developed considerable contrariety of opinion among publicists, the question being,— Does international law, independent of treaty, render it obligatory upon a nation to surrender a criminal who has fled to its jurisdiction for protection from the justice of another nation, on requisition of the latter? The affirmative has the support of many distinguished writers on public law, who cogently and plausibly insist that every nation is bound by the plainest dictates of justice to deny an asylum to criminals from the justice of a nation whose laws they have violated. The negative also has had its supporters among publicists of repute. Some of the judicial tribunals of the United States, both state and federal, have reinforced the negative with their adjudications. Since those judicial decisions, however, the United States has assumed the obligation of surrender with most of the civilized nations, thus taking the question out of the field of diplomatic controversy, and of judicial conflict, as between the contracting nations.

Whatever may have been the opinion of publicists, or the practice of nations, at any past time, or the reasons for such opinions and practice, it appears quite plain to the writer that there is no reasonable ground, at present, for a difference of opinion on this important question. No guilty person should be able to secure immunity for crime against his own nation, by taking refuge in another

¹ See Vattel, *Droit des Gens*, liv. i, v, ch. 5, §§ 55–65; Rutherford's *Inst.*, vol. ii, b. ii, ch. 9, § 20; Lawr. Wheat. *Int. Law* (2d Ann. ed.), p. 373 *et seq.*; 1 Kent, *Com.* (5th ed.), p. 38 *et seq.*

jurisdiction. Modern facilities for international communication have brought the great family of nations into close neighborhood, and promoted among them intimate commercial and social relations. Escape from the jurisdiction of one country to that of another is comparatively easy. If extradition could not be effected, a fugitive criminal might easily evade punishment however heinous his crime, since he could not be punished by the tribunals of his asylum for a crime committed within the territorial limits, and against the laws, of another nation.

It may sometimes be difficult to determine the class of crimes to which extradition applies, in the absence of positive international agreement; but by general understanding and usage, it is limited to crimes of an atrocious character, and such as affect the public safety, including murder, robbery, treason, and other high crimes.

Before surrendering an alleged criminal on demand, the government may, and should, become satisfied that there exist reasonable grounds for the charge, and sufficient evidence to put the accused upon his trial in the foreign courts.¹

14. *Letters of marque and reprisal*.—These are reprisals by commission from the government, and, while deemed compatible with a state of peace, and generally classed in this division of international law, they are warlike and summary in aspect and procedure. They are granted as a means of redress in cases of specific injury to the nation, or to one or more of its subjects, committed by another nation or its subjects. Satisfaction for the injury

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 232 *et seq.*; 1 Kent, Com. (5th ed.), p. 36 *et seq.*; Grotius, b. 2, ch. 21, §§ 3, 4, 5; Vattel, b. 2, ch. 6, §§ 76, 77; Woolsey, Int. Law, §§ 77-80; And. Law Dic., title "Extradition."

being refused by the offending party, a commission, or letters of marque and reprisal, are issued to vessels owned and officered by private persons, authorizing them to go beyond the line or *mark* (marque) of their own territorial boundaries, and seize the property of the offending party, whether nation or its subjects, by way of reprisal. The property so seized may be brought in and detained as a pledge, or disposed of under judicial sanction, unless redeemed by the owner or offender, by payment of damages.¹

It is not deemed necessary to treat this topic further, it being quite probable that in the near future this mode of redress for specific injuries will disappear from the code and practice of civilized nations. It is extremely liable to abuse, has caused injustice and national embarrassments, and is not at present generally regarded with favor.²

The foregoing outline presentation is not exhaustive of the topics of international law in time of peace, usually fully discussed in works devoted exclusively to the law of nations; but it gives the prominent features and leading doctrines of that division of international law, and will, it is believed, furnish the reader with a correct general knowledge of the subject, and a convenient guide to full details.

§ 98. **International law in time of war.**—There being no common tribunal to which the controversies between independent nations may be referred for adjustment, national disputes and grievances can only be settled and redressed in one of three ways: by diplomacy, arbitration, or force, which generally means war.

¹ Kent, Com. (5th ed.), p. 61 *et seq.*; Lawr. Wheat. Int. Law (2d Ann. ed.), p. 505 *et seq.*; 1 Bl. Com., p. 258; Woolsey, Int. Law, § 127.

²See 2 Cooley's Bl. (3d ed.), p. 258, note (15).

A declaration of war, or the actual commencement of hostilities, changes the entire relations between the belligerents, and affects to some extent the rights and duties of neutrals.

Having considered in outline the leading principles and rules of international law in time of peace, following on the same plan, there remain for brief discussion the laws of war.

1. *Perfect, and imperfect, war.*—A distinction is made by public writers between *perfect* and *imperfect* war; the former being that in which the whole nation is at war with another nation; the latter that which is limited to certain places, persons, and things. In a perfect war, all the members of each belligerent are the enemies of all the members of the other nation, and authorized to commit hostilities against them in all cases, and in every way, permitted by the laws of war.¹

In the following discussion, perfect war, only, will be considered, that being the character of war in general.

2. *Rights of war against an enemy.*—In the early history of international law, it was held that a state of war between nations justified each in doing to the persons and property of the other all the injury possible, including the imprisonment, and even death, of persons, and the confiscation of all kinds of property, belonging to the national enemy or its subjects. And in the enforcement of this right, little regard was paid to the means employed, if only effectual. But in modern civilization, under the enlightening and benignant influence of Christianity, bad

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 519; United States v. France, 2 Dallas, 21; Id., vol. 4, p. 37; 1 Kent, Com. (5th ed.), p. 55; Grotius, b. 3, c. 3, sec. 9; c. 4, sec. 8; Burlamaqui, part 4, c. 4, sec. 20; Vattel, b. 3, c. 5, sec. 70.

as war is at the best, it yields in some measure to the claims of justice and humanity.

So far as any general rule in respect to the destruction of persons or property has been established, it is that the right corresponds to, and is commensurate with, the appropriate and necessary means of accomplishing the object of the war. This rule apparently assumes that the object of the war, on both sides, ought to be accomplished, as it applies equally to both, thus involving an absurdity. In reality, however, the assumption is not that both belligerents are in the right, but that each so esteems itself — a very safe assumption; and, obviously, it would be impossible to establish a general rule on any other hypothesis. The rule in question, as generally applied in modern warfare, exempts from destruction the persons of the “sovereign and his family, the members of a civil government, women and children, cultivators of the earth, artisans, laborers, merchants, men of science and letters, and, generally, all other public or private individuals engaged in the ordinary pursuits of life,” “unless actually taken in arms, or guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity.”¹

The same principle applies to the territory and other property of the enemy; it may be ravaged or destroyed only when necessary to accomplish the objects of the war. This exempts from destruction “temples of religion, public edifices devoted to civil purposes only, monuments of art, and expositions of science, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory.”² Violations of this rule may and do

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 591 *et seq.*

² *Id.*, p. 596.

occur; and in such cases the aggrieved party is considered at liberty to retaliate in kind when there is no other available remedy or satisfactory defensive measures.

While the ancient harsh and unreasonable practice of indiscriminate destruction or confiscation of the enemy's property, both on land and water, has been greatly modified in modern usage, it is noticeable that in respect to private property a distinction is made between land and sea, property on the former being more favored by exemption from destruction or confiscation than the latter. The distinction is based upon the assumption that destruction or confiscation of property exposed to maritime warfare contributes more directly and effectually to the end in view — the defeat of the enemy.¹

3. *Persons and property in an enemy's country on the outbreak of war.*— At an early day the doctrine was rigidly held and generally strictly enforced that, in the absence of agreement to the contrary, by treaty or compact, the persons and property of one belligerent found within the domains of the other were rightfully subject to be treated, the former as prisoners of war and the latter as lawful plunder, liable to seizure and confiscation as prize of war. And it is recorded of the Romans that they considered it lawful to enslave, or even kill, an enemy found within their territory on the commencement of hostilities.

But the progress of Christian civilization has so far modified the ancient doctrine that it no longer exists, practically at least, in its original repulsive harshness. Consideration is given to the fact that persons and property of the enemy found in the country on the outbreak of war came there in time of peace, with the express or implied consent of the sovereign power, with the reasonable

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 626.

expectation of protection to person and property while obedient to local laws. Another reason for the non-enforcement of the ancient doctrine may be found in the fact that its victims would rarely, if ever, have been in any way responsible for the war or for its causes. Under such circumstances it seems quite clear that justice and humanity for persons thus innocently caught on the enemy's ground entitles them to a reasonable time to leave the hostile country with their personal effects, without the loss of life, liberty or property. The general trend of public sentiment is in this direction, although a lack of unanimity on the subject may still exist among publicists.

The supreme court of the United States, in *Brown v. United States*,¹ held that the property in question — that of a British subject — found on the land of the United States at the commencement of hostilities could not be confiscated, but should continue under the protection of the law, and might be reclaimed by the British owner on the restoration of peace. The court held, however, that the strict right of confiscation existed, but that its exercise was rather a matter of policy than of law, and that such property could not be judicially condemned without an act of congress directly authorizing it; and no such act existed.²

It is held by public writers of authority that the right of a belligerent nation to seize and confiscate the property of an enemy found in the domains of the former on the outbreak of war does not apply to merchant vessels

¹ 8 Cranch, 110, 228, 229.

² See *The Cargo of the Ship Emulous*, 1 Gallison, 563; 1 Kent, Com. (5th ed.), p. 55 *et seq.*; Lawr. Wheat. Int. Law (2d Ann. ed.), p. 526 *et seq.*; And. Law Dic., title "Confiscation;" U. S. Const., art. I, sec. 8, subd. 11; Acts of Congress, Aug. 6, 1861, and July 17, 1862; *Miller v. United States*, 11 Wall. 308, 312, 313; *Kirk v. Lynd*, 106 U. S. 319; *Phoenix Bank v. Risley*, 111 U. S. 125.

at sea or floating in port; but that such vessels should have time to depart without molestation, and should be given time to escape from danger when met on a voyage by an enemy's cruiser. It is said, however, in substance, that this distinction is often ignored in practice.¹

Vessels of a belligerent nation in an enemy's port on the commencement of hostilities may be and sometimes are placed under embargo by the government and detained as subjects of condemnation. The seizure in itself has a hostile aspect, and when resulting in confiscation will become in effect what is known in the books as a "hostile embargo;" but if amicably adjusted it takes the milder name of a "friendly embargo." The first is, therefore, equivocal; but the end by retroaction determines its character.²

4. *Capture and prize of war.*—Property of the enemy captured at sea in open war by an armed vessel of the government, or by a duly commissioned armed privateer, vests primarily in the sovereign, or government. No private person can rightfully claim any interest therein except under grant of the government. But by the general practice of nations, regulated by their local laws, when property thus taken is duly condemned as lawful prize of war and sold, the captors are permitted to share in the proceeds "as reward for bravery, and a stimulus to exertion."³

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 534 and note; Massé, *Droit Commercial*, liv. ii, tit. i, ch. 2. sec. i, p. 140; *Id.* § 2; Azuni, *Droit Maritime de l'Europe*, ch. 4, art. I, § 7, tom. ii, p. 287; 1 Kent, Com. (5th ed.), p. 56 *et seq.*

² 1 Kent, Com. (5th ed.), p. 69 *et seq.*; Lawr. Wheat. Int. Law (2d Ann. ed.), p. 510 *et seq.*

³ 1 Kent, Com. (5th ed.), p. 100 *et seq.*; Grotius, b. 3, c. 6; Vattel, b. 3, c. 9, § 164; Lawr. Wheat. Int. Law (2d Ann. ed.), pp. 627 *et seq.*

It will be seen by the authorities cited that when a vessel is seized as prize of war it must be taken with due care and without unnecessary delay into a convenient port for adjudication by a prize-court or other court having jurisdiction in the premises sitting in its own country or that of its ally. The jurisdiction of the national courts of the captor to determine the validity of such seizure is held to be exclusive, with two exceptions: 1. Where the capture is made within the territorial limits of a neutral country; and 2. Where it is made by armed vessels fitted out within the neutral territory. In either of these cases the jurisdictional tribunals of the neutral nation may determine the validity of the captures and restore the property of its own subjects, or the subjects of the nation in amity with it to the original owners.¹

The government of the captor is responsible for the acts of its war vessels and commissioned cruisers, when these acts are confirmed by the definitive sentence of its own courts appointed to determine the validity of captures in war; and an unjust sentence of a foreign court is ground for reprisal.

5. *Jus postliminii*.—In virtue of this right, “when property taken by the enemy is recaptured or rescued from him by the fellow-subjects or allies of the original owner, it does not become the property of the recaptor or rescuer, as if it had been a new prize, but is restored to the original owner by right of postliminy, upon certain terms.”²

669 *et seq.*; *The Elsebe*, 5 Rob. 173; *Home v. Earl Camden*, 2 H. Black. 533.

¹ *Cushing v. Laird*, 107 U. S. 76-82; 15 Blatch. 239; *And. Law Dic.*, title “Admiralty;” *ante*. § 87; *Lawr. Wheat. Int. Law*, p. 621; *Const. U. S.*, art. I, sec. 8, cl. 11; 2 *Story, Const.*, §§ 1168-1177, 1668-1674.

² 1 *Kent, Com.* (5th ed.), p. 108; *And. Law Dic.*, title *Postliminii*.

To entitle movable property to the full benefit of this rule of international law, the recapture or rescue must be prompt in order to avoid the difficulty of recognizing his goods which delay might cause the owner, and to forestall the presumption of the owner's relinquishment of claim to the property. As the same effects from delay could not result in case of real property, the same rule does not apply; where the reason of a rule ceases, the rule itself ceases.

The right of postliminy does not extend to neutral countries because a neutral country is not at liberty to discriminate between the belligerents in respect to the justice of the war so far as its effects are concerned, and must regard every acquisition made by either party as lawful except in cases where the capture itself is an infringement of the jurisdiction or rights of the neutral nation. But in respect to persons the rule is different; the right of postliminy exists even in a neutral country. When prisoners are brought into a neutral port by their captors, and kept on board the vessel, they are, in contemplation of law, on the rational territory of their captors, and the right of postliminy applies; but if they are permitted to go at large on shore, they are free from the rightful control of their captors, and from the legal effects of the capture.¹

6. *Trading and contracts with the enemy.*—A state of war between nations makes enemies of their subjects respectively, as we have seen,² and necessarily interdicts commercial intercourse between them, which would involve the incongruity of two nations at war with each

¹ 1 Kent, Com. (5th ed.), p. 108 *et seq.*, and authorities there cited; Lawr. Wheat. Int. Law (2d Ann. ed.), pp. 629, 669 and authorities there cited.

² *Ante*, § 98, subd. 1.

other and their subjects at the same time at peace and sustaining friendly relations with each other. Such a condition of affairs would be in direct conflict with the law of nations, which enjoins upon the subjects of each belligerent to seize the goods of the enemy and its subjects and to do them all the harm in his power not inconsistent with the limitations of such power recognized by civilized nations. It would, moreover, give "aid and comfort" to the enemy by supplying food, furnishing them with the means of conveying intelligence, carrying on a correspondence with the enemy, and in various ways embarrassing their own nation in the pending conflict. But cases may occur in which the wants and mutual interests of the belligerents may require a relaxation of the inhibitory rule, and in which a limited commerce between the subjects of the hostile nations may be permitted without detriment to either, and with benefit to their respective subjects, and in such cases the sovereign power may grant trade licenses adapted to the circumstances of each case.

In addition to such penalties as a nation may see fit to prescribe for a violation of this law, the transgressing subject has no protection of law for his property ventured in the forbidden traffic, which may be seized and condemned as prize of war.

Unlicensed contracts with an enemy are illegal on the same grounds that trade with the enemy is inhibited. This inhibition is very broad in its application, including, among other things, the insurance of enemy's property, the drawing of a bill of exchange by an alien enemy on a subject of an adverse country, the purchase of bills on the enemy's country, or the remission of funds, in money or bills, to the subjects of the enemy, and, in short, to all attempts to trade with the enemy, directly or indirectly, and by whatever means.

§ 99. **General rights and duties of neutral nations.** Having discussed, briefly, in separate divisions the rights and duties of nations, first in time of peace, and secondly in time of war, there remain for consideration the rights and duties of neutral nations, which for convenience of both writer and reader will now be treated separately in a third division.

1. *Definition of neutrality.*—The term *neutrality* is so well understood in our English vocabulary that a definition would be wholly superfluous, except for historic interest. Among the early maritime nations neutrality was unknown; the right of one member of the family of nations to remain at peace, while other members were at war, was not recognized; all were either belligerents, allies or enemies. Hence, the nomenclature of international jurisprudence contained no word signifying neutrality, as the term is now employed. When the ancient barbarous rules and conduct of war had relaxed under the influence of Christian civilization until a condition was reached in which nations were permitted to remain neutral if they so wished, no word was found in their language concisely and accurately expressing their relation to the belligerents, or the meaning of *neutrality* as the term is now employed in the law of nations. To meet this difficulty they adopted such terms as *amici*, *medii*, *pacatii*, *socii*, and *non hostes*, neither of which clearly expressed what is now understood by the term *neutrality*.

It is enough for practical purposes to know that a neutral nation is one that takes no part in a contest between other nations; and that at the present time it is the undoubted right of every independent nation to remain neutral while its neighbors are at war.¹

¹ Lawr. Wheat. (2d Ann. ed.), pp. 536 *et seq.*, 544 *et seq.*, 596; 1 Kent, Com. (5th ed.), pp. 67 *et seq.*, 116 *et seq.*; The Rapid, 8 Cranch, 155;

2. *Impartiality of neutrals*.—Neutrality implies and requires impartiality towards the belligerents; and impartiality inhibits the neutral from favoring one party at the expense of the other. Enjoyment of the privileges of neutrality by a nation imposes upon it the obligation of faithfully performing its duties as such, the leading duty being that of impartiality, which should restrain the neutral from giving aid to one party which would not as readily be extended to the other. The favoring of one belligerent in any way to the prejudice of the other is in itself a violation of neutrality. So strictly is this rule held, that a loan of money to one of the parties is considered and treated as a breach of neutrality. But the obligation of neutrality does not go to the length of prohibiting the fulfillment of engagements made prior to the commencement of hostilities, and with no reference thereto, which do not make the neutral nation a participant in the war.¹

3. *Inviolability of neutral territory*.—The territory of an impartial neutral nation is entitled to exemption from invasion by the belligerents in time of war, and from all unnecessary and injurious interference with its commerce, and other national rights and privileges. This principle has numerous applications and illustrations found in our books, some of which, mentioned by Chancellor Kent, follow: A neutral “may become the carrier of the enemy’s goods without being subject to any con-

Potts v. Bell, 8 Term Rep. 548; The Juffrow Catharina, 5 Rob. Adm. 141; 1 Chitty on Commercial Law, 378; The Hoops, 1 Rob. Adm. 196; Bynkershoek, Quæst. Jur. Pub., lib. i, cap. 3.

¹ Bynkershoek, II., c. 9; Burlamqui, vol. ii, part 4, c. 5, secs. 16, 17; Manning’s Com., p. 180; Vattel, b. 3, 6, secs. 99, 100, 101; Id., c. 7, secs. 104, 105; Dewntz v. Hendricks, 9 Moore’s C. B. 586; 1 Kent, Com. 5th ed., p. 116 *et seq.*

fiscation of the ship, or of the neutral articles on board; though there is the risk of having the voyage interrupted by seizure of the hostile property. As the neutral has the right to carry the property of enemies in his own vessel, so, on the other hand, his own property is inviolable, though it be found in vessels of enemies." Neutrality "protects the property of the belligerents when within the neutral jurisdiction. It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made under neutral jurisdiction, the neutral is bound to redress the injury, and effect restitution." "It is a violation of neutral territory for a belligerent ship to take her station within it, in order to carry on hostile expeditions from thence, or to send her boats to capture vessels being beyond it. No use of neutral territory, for the purposes of war, can be permitted."¹

"Though a belligerent vessel may not enter within neutral jurisdiction for hostile purposes, she may, consistently with a state of neutrality, until prohibited by the neutral power, bring her prize into a neutral port and sell it." "But neutral ships do not afford protection to enemy's property, and it may be seized if it be found on board of a neutral vessel beyond the limits of the neutral jurisdiction."

"It is also a principle of the law of nations relative to neutral rights, that the effects of neutrals found on board of enemy's vessels shall be free; and it is a right as fully and firmly settled as the other, though like that, it is often changed by positive agreement."

Enough has now been said to illustrate the general principles pertaining to the inviolability of neutral territory.

¹ 1 Kent, Com. (5th ed.), p. 116 *et seq.*, and cases there cited; Lawr. Wheat. Int. Law (2d Ann. ed.), ch. III.

4. *The law of blockade.*— A blockade consists in the investment of a sea-port by a competent naval force, with a view of interrupting trade and commerce to neutrals.¹ Its object is, obviously, to diminish the resources of the enemy and cripple its power. It is not only a right of great importance to belligerents, but in some cases, when strictly enforced, it proves a serious detriment to neutrals. Any attempt of a neutral, or an enemy, to violate a blockade renders the offender's ship and cargo liable to seizure and confiscation by the blockading power. But to the enforcement of such a penalty, two conditions precedent are essential, namely: First. The investing power must have been able to enforce the blockade at every point, and all the time; in other words, there must have been a blockade in *fact*, as well as in *name*. Neither a mere proclamation or "paper blockade," nor an inadequate force, will suffice. It has been judicially held, however, that the occasional absence of the blockading squadron, caused by force or accident beyond control, as a violent storm, does not terminate the blockade, provided the cause of the suspension be known, and its enforcement be resumed within a reasonable time after the cause is removed. And an attempt to take advantage of such a temporary suspension, if the cause be known to the neutral, will be regarded and treated by the law as an act of bad faith. If, however, a blockade be raised voluntarily, or by a superior force of the enemy, it ceases altogether. Second. The neutral must have due notice, actual or constructive, of the blockade, in order to subject him to the penal consequences of its violation. The notice may have been actual, formally communicated by the blockading power, constructive, by notice to its government, or pre-

¹ And. Law Dict., title "Blockade;" United States v. The William Arthur, 3 Ware, 280, 281.

sumptive by its notoriety. A blockade may be so widely known as to charge all neutrals with knowledge of its existence. A notice to a foreign government is a notice to all its subjects, as it is the duty of the neutral government, on receipt of a formal notice, to communicate the same to them, and they will not be permitted to shield themselves under a plea of neglect of duty on the part of their government.¹

5. *Contraband of war*.—By the law of nations, trade of neutrals with the respective belligerents is subject to some restrictions. Just what articles of commerce are contraband of war it is impossible to specify, as the number and kinds vary with the differing conditions of times, and variety of circumstances. The question has given rise to much discussion in the past, not infrequently causing heated controversies between nations, and developing considerable contrariety of opinion among publicists. It may safely be said, however, that the restriction applies to all kinds of warlike equipments and materials, and all articles and aids ordinarily used in warfare, including transportation and commissarial stores. But as to food supplies, and some other articles, whether contraband or innocent, depends in every case upon their character and the *animus* of their contribution. Chancellor Kent says: ² “It is the *usus bellici* which determines an article to be contraband; and as articles come into use as implements

¹ Bynkershoek, b. 3, ch. 7, § 117; The Betsey, 1 Rob. Adm. 78; Chitty on Commercial Law, 450; The Stert, 4 Rob. Adm. 65; The Frederick Molke, 1 Rob. Adm. 72; The Columbia, 1 id. 130; The Juffrow Maria Schroeder, 3 id. 155; Radcliff v. Union Ins. Co., 7 Johns. 38; The Neptunus, 1 id. 144; The Vrow Judith, id. 126; The Cornet, 1 Edw. 32; Olivera v. Union Ins. Co., 3 Wheat. 183; Lawr. Wheat. Int. Law (2d Ann. ed.), p. 819 *et seq.*; 1 Kent, Com. (5th ed.), p. 143 *et seq.*

² 1 Kent, Com. (5th ed.), p. 140.

of war which were before innocent, there is truth in the remark that, as the means of war vary and shift from time to time, the law of nations shifts with them; not, indeed, by the change of principles, but by a change in the application of them to new cases, and in order to meet the varying uses of war.

Contraband articles on board ship are subject to seizure and confiscation, as is the ship also, in some cases. Stated more fully, the penalty for carrying contraband articles is the following: "If the ship and cargo do not belong to the same person, the contraband articles only are confiscated, and the carrier-master is refused his freight, to which he is entitled upon innocent articles which are condemned as enemy's property. But where the ship and the innocent articles of the cargo belong to the owner of the contraband, they are all involved in the same penalty."¹ And even where the ship and the cargo do not belong to the same person, the like fate may overtake both the ship and the innocent cargo, by carrying contraband under circumstances indicating a fraudulent evasion of the law, such, for example, as sailing under false papers.²

6. *The right of search and seizure.*—The belligerent right to visit and search neutral merchant vessels at sea is well established in the law of nations, being essential to the right of capturing enemy's property contraband of war. It furnishes the only effectual means of preventing fraudulent evasions of the law, and protecting valuable rights of belligerents, so long as the sea remains a convenient theatre for fraud and crime by persons who

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 806.

² Lawr. Wheat. Int. Law (2d Ann. ed.), p. 767 *et seq.*; 1 Kent, Com. (5th ed.), p. 186 *et seq.*; The Peterhoff, 5 Wall. 58; The Commercen, 1 Wheat. 387.

are restrained only by fear of the penal consequences to themselves. A neutral vessel suspected of carrying enemy's property or troops, or despatches, or of otherwise violating the law of neutrality, may be seized and searched by a duly authorized belligerent vessel; and if evidence be found showing the suspicion to have been well founded, or sufficient to raise the presumption of an offense, the vessel may be captured and brought into port for adjudication by a prize court, and for confiscation if judicially condemned. The doctrine of search and seizure, and its enforcement, has been subject to much adverse criticism in the past, the right, even, being denied by some distinguished writers on international law, on the specious plea that "free ships make free goods;" and on the further ground that a neutral flag should be accepted as a sufficient guaranty of the honest neutrality of the ship and cargo over which it floats. And the exercise of this right is still looked upon with an unfriendly eye by parties unwillingly subjected to its enforcement. Notwithstanding all opposition, however, the right of visitation, search and seizure has deservedly obtained a secure place in the jurisprudence of nations.¹

The foregoing outline-view presents the reader with the general principles, and prominent features, of international law, in accordance with the plan of this work; leaving, in the main, non-essential details to works devoted exclusively to the subject. But references to reliable authorities are furnished for the benefit of readers who may desire a full knowledge in detail of this interesting and important branch of jurisprudence; and those who require such knowledge for professional work.

¹ Lawr. Wheat. Int. Law (2d Ann. ed.), p. 846 *et seq.*; 1 Kent, Com. (5th ed.), p. 152 *et seq.*; Woolsey, Int. Law, §§ 208, 213; Webster's Works, 329, 235; The Marianna Flora, 11 Wheat. 42; *ante*, § 97, subd. 11.

CHAPTER XI.

THE LAW-MERCHANT.

SECTION 100. Noticed on account of its relation to other subjects.

§ 100. A brief notice of this subdivision of law, in passing, is suggested by its relation to international law, just treated, several subjects of which it embraces, and of which, indeed, it is deemed a branch by public writers. It is also regarded as a branch of the common law, being, like the latter, an outgrowth of custom.

The law-merchant enters so largely into the commercial and maritime affairs of nations that a knowledge of its rules is important for the man of business and essential to a successful lawyer.

The first mention of the law-merchant in recorded history is found in the simple and touching Bible account of the transactions between Abraham and Ephron the Hittite, which occurred about eighteen hundred and fifty years prior to the Christian era. The patriarch purchased of Ephron the cave of Machpela for the burial of his beloved Sarah, and paid therefor the sum of four hundred shekels of silver, "*current money with the merchant.*"¹

Chancellor Kent says:² "When Lord Mansfield mentioned the law-merchant as being a branch of public law, it was because that law did not rest essentially for its character and authority on the positive institutions and local customs of any particular country, but consisted of

¹ Genesis, 23:16.

² Kent, Com. (5th ed.), p. 2.

certain principles of equity and usages of trade which general convenience and a common sense of justice had established to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world."

The origin and character of the law-merchant is forcibly and felicitously expressed by Justice Swayne, of the United States supreme court, as follows: "The law-merchant was not made; it grew. Customs have sprung from the necessity and convenience of business, and prevailed in duration and extent until they acquired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow, by successive accretions. It is the outcome of time and experience, wiser law-makers, if slower, than legislative bodies."¹

Judge Beck, of Iowa, says: "The rules applicable to commercial paper were transplanted into the common law from the law-merchant. They had their origin in the customs or course of business of merchants and bankers, and are now recognized by the courts because they are demanded by the wants and convenience of the mercantile world."²

The unwritten or common law, as we have seen,³ consists of a body of principles and rules which, originating in usage and ripening into custom, finally became established law; usage, custom, law, were the natural evolutionary steps. A law thus developed may be general or local in its territorial sphere, and limited or general in the subjects of its application.

The law-merchant embraces in its scope the subjects above mentioned and others of like character.

¹ Merchants' Bank v. State Bank, 10 Wall. 651.

² Woodbury v. Roberts, 59 Iowa, 349.

³ *Ante*, ch. V.

Having in previous chapters discussed the common law and international law, of each of which the law-merchant is a branch, and having also taken an outline view of admiralty and maritime law, some of whose subjects come within the purview of the law-merchant, no further space need be given to this chapter.¹

¹ For further general authorities see 1 Bl. Com., p. 75; Edwards on Bills, etc. (2d ed.), pp. 46, 264, 265, 288, and notes; Re Chandler, 4 Bankr. Reg. 215; Ross v. Jones, 22 Wall. 593; Strother v. Lucas, 12 Pet. 446; Pom. Munic. Law (2d ed.), pp. 351, 352.

CHAPTER XII.

THE MOSAIC CODE.

- SECTION 101. A source of the unwritten law.
- 102. The unity of God.
 - 103. The judicial system.
 - 104. Hebrew agrarian polity.
 - 105. Particular provisions of the Mosaic and criminal codes.
 - 1. Inalienability and redemption of lands.
 - 2. Primogeniture.
 - 3. Violation of personal and property rights.
 - 4. Criminal laws.

§ 101. A source of the unwritten law.— The laws of a nation in any age are a reflex of its civilization. Law and general history are contemporaneous in origin, concurrent in growth, inseparably connected, and mutual expositors. Neither can be thoroughly understood without a knowledge of the other; and especially is the study of law in the light of history essential to a just and full comprehension of its principles and spirit. The genius and dominant principles of the great body of our unwritten or common law are contributions from various sources in the past; some of which principles have come down to us through a long succession of ages, modified in their course, more or less, by the changing conditions of society in the progress of civilization. Hence, the importance and value of tracing the tributaries of our law to their sources, both as an aid to a thorough understanding of its principles and spirit, and as an essential part of a liberal education.

The late Prof. Pomeroy very justly says:¹ "A knowledge of the general principles, the bold outlines and grand features of our municipal law should be considered an essential part of a liberal education and culture. The science of law is multiform. It reaches out, seizes, and draws in its methods and materials from many departments; here it sends down a root into the undefined and almost hidden traditions of the past, and now supports itself upon the premises and conclusions of the purest and simplest morals; its deductions are sometimes cast in the mould of the severest logic, and again assume the form of historical narrative. It extends from the birth of a nation or race over generations and centuries to the busy life of the present day. It is, in short, the summing up of almost all knowledge not strictly physical. It demands a familiarity with history, with ethics and with logic. Whatever we have learned elsewhere will contribute its aid in the study of this comprehensive science."

The same views, more fully elaborated, were expressed by that distinguished jurist and ripe scholar Sir William Blackstone, on taking the chair of law in the Vinerian Professorship inaugurated at Oxford University in October, 1758. His introductory lecture on that occasion is a thoroughly convincing plea for the study of law as an essential part of a liberal education.²

The reader's attention is also directed to the wise and highly important comments of the late Prof. Cooley, in the introduction to his Blackstone, modestly entitled: "Suggestions concerning the Study of the Law."³

The author, in another place, has defined law thus: "Law is the ordinance of God, the science of truth, the

¹ Pom. Munic. Law (2d ed.), § 1.

² 1 Cooley's Bl., Introduction, p. 3.

³ Id., Introductory.

perfection of reason and the method of justice. If this definition of law be correct, or not widely incorrect, it follows irresistibly that a knowledge of its history and principles is of inestimable value to the citizen in all the relations of society. Law is the atmosphere in which we live and move and have our social being. It surrounds us from the cradle to the grave; dominates every interest of society; guards life, liberty, property and education, and protects our firesides and altars. On a general and cursory view, simply, it is quite apparent that the study of law, in its history and principles, as a requisite to a general education, is invaluable. A knowledge of the law as a science and a growth would add much to the significance of the expression, *a liberal education*. Connected with the law, thus viewed, there is wealth of lore. This is evident from the fact that our body of municipal law is the concrete product of the wisdom, thought, culture and experience of all the historic past.

Notice was taken of the Hebrew civil polity in discussing the origin of government and law;¹ but it will now be further considered as one of the sources of the unwritten or common law.

It is to be regretted that in pointing out the sources of our municipal law publicists have quite generally omitted the Hebrew constitution and laws. For this omission no reason, to the writer's knowledge, has been given, and no *good* reason, it is believed, can be assigned. It is quite certain that the germs of some of the important principles of our institutions and laws are found in the Mosaic system. In our quest for examples of these germs it will be helpful to take a cursory view of the leading features of the Hebraic government and constitution. This, because a nation's government and constitution are the bases

¹ *Ante*, ch. II.

on which all the valid legislation, statutory and judicial, must rest, to the principles and spirit of which it is supposed to conform, and in view of which it must be interpreted.

§ 102. **The unity of God.**¹ — On a casual view there is a seeming incongruity involved in the suggestion of the unity of God as a fundamental idea in the constitution and judicial code of a civil government; but upon examination the seeming incongruity disappears. The Hebrew system of government and law presents a unique combination of the divine and human, of theocratic and democratic elements, which only divine wisdom could devise. God gave to the people at Sinai the Decalogue, which, in its letter and spirit, embraces all the duties of man to his Maker, and to his fellow-men, in all the relations of life, constituting an inerrant directory for right living. But this compendium of law, divine and human, did not exhaust the wisdom of God, nor end his beneficent provisions for his creatures. Through Moses, God's inspired minister, the Decalogue was expanded into the Hebrew civil and criminal codes, prescribing specific rules of government and law, adapted to the varied wants of the people, and enabling all to understand the principles of the divine law as epitomized in the Decalogue, and rendering disobedience inexcusable. The supplemental codes did not supersede the Decalogue; it remained, and will remain through all time, an epitome, in principle, of divine and human law, binding upon humanity in every age of the world, and in all conditions of society.

We are now prepared to understand the reason for assigning a leading place to the unity of God in the Hebrew constitution. God was sovereign by creation and

¹ Deut. 6: 4.

providence, and the civil Ruler of the nation by the voluntary choice of the people. As such, He was entitled to their undivided allegiance, and implicit obedience. Indeed, the nation could not exist and prosper without such unity, allegiance, and obedience. This prime element in the organic law of the Hebrew nation was the prototype, and is essential to the existence and prosperity, of all civilized governments in every age of the world. No matter what the form of government, or in whom, or what body, its supreme governing power is vested, that power is entitled to the undivided loyalty and obedience of all its subjects. This important truth has the highest possible sanction in the utterance of the great Teacher of Galilee:¹ "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other."

The history of the Hebrews, especially during the earlier portions of their separate nationality, furnishes abundant evidence of their tendency to polytheism and gross idolatry. The reasons for this need not be here discussed; the fact is sufficient for our purpose. Nor is it necessary, in this connection, to do more than remind the reader that the influence of idolatry upon the character and condition of the people was exceedingly vicious and degrading. It led them, moreover, into direct rebellion against the government of God, in both its religious and civil supremacy. The Hebrew government, established at Sinai, as already stated, combined in its unity the apparently antagonistic elements of theocracy and democracy, imposing upon its subjects the obligation of allegiance and obedience to God, both as the religious and civil head of the nation. Hence, as we have seen,² idolatry was treason against the civil government,

¹ Matt. 6: 24.

² *Ante*, ch. II.

as well as a violation of the divine law. And hence, also, the truth of the initial statement of this section, that the unity of God constitutes a fundamental principle in the Hebrew civil government.

Idolatry was not only treason, the highest crime against any government, divine or human, but the cause of other great evils which could be effectually dealt with in no other way than by striking at the root, and everything that nourished and strengthened it. This satisfactorily accounts for provisions in the Mosaic code which have been severely criticised by infidel writers as trivial, and unworthy their reputed author. For example, the provisions against cutting the hair and beard in a particular manner; boiling a kid in the milk of its dam; the wearing of garments made of linen and woolen mixed together; the interchange of male and female attire; receiving into the public treasury the price of a dog, or the hire of a prostitute; worshiping in groves and high places, and other laws of like general nature. It is found, however, on thorough investigation, and has been shown by eminent public writers, that many of these and other prohibited practices were directly connected with idolatry, which fully accounts for and vindicates the wisdom of this legislation.

§ 103. The judicial system.—The people had a voice in the selection of their magistrates. Moses was the chief, and originally the sole, judge in the nation; but the burden becoming too heavy for him, a graded judiciary was adopted on the wise suggestion of Jethro, the father-in-law of Moses. There were chosen by the people, and appointed by Moses, “rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens; and they judged the people at all seasons: the hard causes they brought unto Moses, but every small matter they judged

themselves.”¹ On a subsequent occasion Moses reminded the people of their participation in this important transaction, and the instructions given by him in respect to the character of the magistrates to be chosen, in the words following:² “Take you wise men, and understanding, and known among your tribes, and I will make them rulers over you. And ye answered me and said, The thing which thou hast spoken is good for us to do. So I took the chief of your tribes, wise men, and known, and made them heads over you, captains over thousands, and captains over hundreds, and captains over tens, and officers among your tribes. And I charged your judges at that time, saying, Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment, but ye shall hear the small as well as the great; ye shall not be afraid of the face of man, for the judgment is God’s; and the cause that is too hard for you, bring it unto me and I will hear it.”

No mere human system for the administration of justice has ever been devised which surpassed in wisdom and benevolence the Mosaic code, in its methods, principles, and animus, as above briefly presented.

§ 104. **Hebrew agrarian polity.**—It is a political doctrine of wise statesmen, and vindicated by history, that national power and prosperity depend largely upon the distribution and ownership of the soil.³ This principle of political philosophy is forcibly stated by President Wines, as follows:⁴ “It is a principle of political philoso-

¹ Ex. 18: 13–26. °

² Deut. 1: 13–17.

³ Harrington, Oceana, p. 37; Lowman, Civil Gov. Heb., ch. 2; Adams, Defence, Letter 29.

⁴ Laws of the Ancient Hebrews, pp. 400, 401.

phy, first announced by Harrington, and much insisted upon by Lowman, and the elder Adams, that property in the soil is the natural foundation of power, and consequently of authority. This principle will not now be disputed. Hence the natural foundation of every government may be said to be laid in the distribution of its territories. And here three cases are supposable, viz.: the ownership of the soil by one, the few, or the many. First, if the prince own the lands, he will be absolute; for all who cultivate the soil, holding of him, and at his pleasure, must be so subject to his will that they will be in the condition of slaves, rather than of freemen. Secondly, if the landed property be shared among a few men, the rest holding as vassals under them, the real power of government will be in the hands of an aristocracy, or nobility, whatever authority may be lodged in one or more persons, for the sake of greater unity in counsel and action. But, thirdly, if the lands be divided among all those who compose the society, the true power and authority of government will reside in all the members of that society; and the society itself will constitute a real democracy, whatever form of union may be adopted for the better direction of the whole as a political body. Under such a constitution, the citizens themselves will have control of the state. They will not need to have this power conferred upon them by express grant. It will fall into their hands by the natural force of circumstances, by the inevitable necessity of the case."

The elder Adams says respecting agrarianism in this country: "The agrarian in America is divided into the hands of the common people in every state, in such a manner that nineteen-twentieths of the property would be in the hands of the commons, let them appoint whom they might for chief magistrate and senators. The sovereignty,

then, in fact as well as in theory, must reside in the whole body of the people; and even an hereditary king and nobility, who should not govern according to the public opinion, would infallibly be tumbled instantly from their places."¹

In accordance with this political doctrine, Moses caused the national domain to be so divided that the whole six hundred thousand free citizens should have full and exclusive property in an equal part of it in perpetuity, which gave to each family an inalienable title to a small farm of about twenty-five acres.²

It is quite apparent, on a mere statement of this policy, that it tends to promote equality among citizens, and prevent extremes of wealth and poverty, which tend to produce class antagonisms, and cause discord and suffering in society, where there are no barriers to monopoly, or limitations of wealth, either in land or personal property.

President Wines justly says:³ "Great inequality of wealth in a nation is a great evil, to be avoided by the use of all just and prudent means. It was a leading object with Moses to give to his constitution such a form as would tend to equalize the distribution of property. Under his polity the few could not revel in the enjoyment of immense fortunes while the million were suffering from want. Misery was not the hereditary lot of one class, nor boundless wealth of another."

It has been suggested that the prosperity of England, where ownership of the land is confined to the few, is antagonistic to the foregoing political philosophy. But the case of England may be only an exception to the rule; not difficult of explanation. The national debt of

¹ Defence, Letter 29.

² Numb. 33: 54; Levit. 25: 23.

³ Laws of the Ancient Heb., p. 403.

England, amounting to several billions, has created an exceptional species of property, known as funded property, which has the stability of real estate, and is widely diffused among the people, giving to investors in the funds independence, influence, and power, naturally conferred by ownership of the soil. It may be added that the vast commercial and manufacturing wealth of England tends to diminish the political influence of territorial possessions. But, assuming that the same effects, to a greater or less extent, may result from causes other than a general division of the soil among the people, it by no means follows that the tendency of such a distribution is not the production of equality among citizens, and the prosperity both of the citizen and the state. Nor does it show, or tend to show, that the concentration of the national territory in the hands of a few is not a dangerous condition of society.

It may safely be affirmed that, whatever governmental polity, or permitted practice, tends to produce extremes of wealth and poverty, is evil in its effects upon society, and menacing to the stability and prosperity of the government.

This suggests the possibility, if not the probability, of danger ahead for the United States, from the monster trusts and combinations organized of late. Some of these combinations have each a capital of millions, and are able to control the output and product prices of the several manufacturing industries and business enterprises which they respectively represent. Public attention having been recently directed to the Standard Oil Company, in the congress of the United States, it may properly be cited as an example. On the 16th day of March, 1900, Representative Fitzgerald, of Massachusetts, introduced a resolution in the house of representatives, with the following preamble: "Whereas, it appears as a matter of

public record that the Standard Oil Company paid in the city of New York, on March 15, 1900, the sum of seventeen million dollars, this amount being an extra dividend, in addition to the regular quarterly dividend of three million dollars; and whereas, it is a matter of public record that this last dividend is five million dollars in excess of the last quarterly dividend paid by this corporation; and whereas, it is also a matter of public record that the price of kerosene oil, the sole means of lighting used by the middle and poorer classes of people, during the period of time between the declaration of these dividends, was increased three cents per gallon, constituting a tax on every home in the land." There has not been a time, at this writing, for congress to have acted on the resolution following the preamble quoted; and what action, if any, will be taken is simply conjectural. Numerous other controlling corporations and trusts exist, and the number is rapidly multiplying in the country, to the alarm of thinking men. Obviously the natural effect will be to create monopolies, destroy competition, drive small manufacturers and dealers out of the field, leaving them in actual or comparative destitution, and the middling and poorer classes to the tender mercies of monopolists who will control the prices of the necessities of life. It is often heard in defense of these combinations that they lower the cost of production, and thus enable them to supply the consumer at reduced rates. It may be true that they *do* reduce the cost of production, and that the corporators might afford to supply the consumer of their products at less cost than the competitive system would permit. But *do* they, and can it reasonably be expected that they ever will, give the consumer the benefit of the lower cost of production? And why should it be expected of them? They combine for the purpose of realizing large profits from the investment of their capital; for the

accomplishment of this purpose they crush out opposition and organize monopoly; they do not combine as religious, or benevolent, but simply as *business*, corporations. In condemning these combinations, it is not necessary or just to assume that the corporators are more selfish than other men; they may differ only in the possession of power to gratify their selfishness. We are constantly reminded that the millenium is not yet the prevailing atmosphere of earth; and he is an indifferent student of human nature who does not know that the average man will first of all study his own interests, and adjust his life-work to their advancement. Whatever else may be said of business monopolies, it cannot reasonably be doubted that they tend to create in society the extremes of wealth and poverty, against which Moses legislated under divine inspiration.

There are important considerations connected with the subject of trusts and corporate monopolies which cannot here be discussed; the subject presents mixed questions of economics, ethics, politics and law, some of which are difficult of satisfactory solution.

Recurring directly to the Hebrew constitution, it should be remarked, in passing, that other advantages accrued to the people from the agrarian polity, to which space cannot here be given. There are also other important features in the Hebrew constitution, to which space cannot here be given, which are found in greater or less prominence in modern governmental structures. To the sovereign power already noticed may be added national unity, liberty, political equality of the people, a voice in the enactment and administration of the laws intrusted to the people, responsibility of public officers to their constituents, a prompt, cheap and impartial administration of justice, universal industry, inviolability of private property, sacredness of the family relation, sanctity and pro-

tection of human life, universal education, and a well-adjusted balance of powers.

§ 105. Particular provisions of the Mosaic civil and criminal codes.—Having considered some of the fundamental principles of the Hebrew constitution, which may be regarded as prototypes of similar constituents in modern institutions of government, it is in order to notice a few particular provisions of the Mosaic civil and criminal codes, as examples of laws which, in substance and principle, have come down to us through all the vicissitudes of intervening ages.

In studying the Mosaic laws it should be remembered that, like all wise legislation, they were adapted to the age, the existing conditions, natural and social, and to the ethnic character of the people; and hence, that some provisions will be found which would be unsuited to different conditions, others that have been modified to suit changed circumstances, and others, still, that have become obsolete. Yet, even in some of these the germ principle has survived.

1. *Inalienability and redemption of lands.*—The land, equally divided among the citizens, was made inalienable, so that it would descend in perpetual succession to the several families, respectively. In case the owner should part with the whole, or any portion, of his allotment, by sale or otherwise, it would remain redeemable by him or his heirs until the year of jubilee, when, if not previously redeemed, it would go free by the law of its tenure; leaving the original owner, or his heirs, at liberty to take possession. This was the rule throughout the land, including dwelling-houses in the villages; but the right to redeem dwelling-houses in walled cities was limited to one year, at the expiration of which time, in default of re-

demption, the transfer became absolute.¹ Referring to the year of jubilee, Dr. Wines says: "At the return of this day, the trumpet peal was heard in street and field, from mountain top and valley, through the length and breadth of the land. The chains fell from the exulting slave. The burden of debt, like that of Bunyan's Pilgrim, rolled off from shoulders long galled by its pressure. The family mansion and the paternal estate again greeted eyes from which misfortune, through many weary years, had divorced them. The inequalities of condition, which the lapse of half a century had produced, once more disappeared. Garlands of flowers crowned all brows; and the universal gladness found vent in music, feasting and merriment."²

The inalienability of landed property, which was a prominent feature in the Hebrew constitution, found a place in the organic laws of other nations through many centuries following its introduction by Moses. England furnishes a near and notable example. In the early history of that nation, and down to a comparatively recent date, the Hebrew polity concerning the permanent alienation of land was maintained and enforced with great tenacity and strictness. Finally, when prominent statesmen, becoming convinced that the right of unfettered alienation was better adapted to existing conditions of the kingdom, especially its commercial character, and attempted a change, a severe struggle with chronic conservatism ensued, which continued through many years. The process of change was gradual, little by little, and not fully completed until the statute of 12 Charles II. took effect.³

¹ Levit., ch. XXV.

² Wines' *Laws of the Anc. Heb.*, p. 404. And see Goodyn's *Moses and Aaron*, I, 3, c. 10, and Jahn's *Bib. Arch.*, sec. 361.

³ 1 Cooley's *Bl.*, ch. 19, p. 286 *et seq.*; 3 Kent, *Com.* (5th ed.), p. 509 *et seq.*

But where, under changed circumstances, the ancient restriction of alienation no longer exists, the Mosaic polity of redemption survives; it is known in England and the United States under the designation "the equity of redemption." This name was derived from the English court of chancery, of which it was the child and jurisdictional subject.¹

2. *Primogeniture*.—The English law of primogeniture may be traced to the Mosaic civil code as its source, in the following remarkable provision:² If a man have two wives, one beloved, and another hated, and they have borne him children, both the beloved and the hated; and if the first born son be hers that was hated; then it shall be, that when he maketh his sons to inherit that which he hath, that he may not make the son of the beloved first born before the son of the hated, which is indeed the first born; but he shall acknowledge the hated for the first born, by giving him a double portion of all that he hath; for he is the beginning of his strength; the right of the first born is his."

3. *Violation of personal and property rights*.—The original of most, if not of all, the actionable torts of modern civil codes, may be recognized, in germ or in full, in the Mosaic civil code, and therein subjected to punishment. For example, trespass upon lands, and wrongful appropriation of personal property;³ responsibility of the owner for injuries inflicted by animals kept by him when knowing them to be vicious and dangerous, as in case of an injury from an ox, "wont to push with his horn in time

¹ 2 Cooley's Bl. (3d ed.), p. 438, par. 4; 4 Kent, Com. (5th ed.), p. 157 *et seq.*; 2 Story, Eq. Jur. (6th ed.), §§ 1014-1017, 1019, 1020.

² Deut., ch. 21, vs. 15-27.

³ Ex. 22: 5-9.

past;”¹ injuries caused by carelessness, even in the use of one’s own property;² slander and false witness condemned; and just balances, weights and measures required.³

Many other examples might be given, but the above from the Mosaic civil code are sufficient for the present purpose.

4. *Criminal laws.*—A few examples of Hebrew criminal laws follow. Willful murder was punished with death;⁴ rape was made a capital crime;⁵ the penalty for man-stealing was death;⁶ sodomy was a capital crime;⁷ incest was forbidden and severely punished;⁸ as were also other crimes found in the criminal codes of the present day. But it is unnecessary to multiply examples. By a careful comparison of the Hebrew civil and criminal codes with judicial systems of subsequent ages, including the present, it will clearly appear that the legislation and writings of Moses have had a marked influence for good upon the jurisprudence of all civilized nations.

The history and literature of the Hebrew nation, as found in the Bible, is a rich treasury of knowledge and wisdom, which amply rewards careful, unbiased study. If studied in an unfriendly spirit, with no honest desire to learn the truth, but for the purpose of gathering ammunition for a bitter onslaught upon the authenticity and genuineness of the narrative which Christians hold to be the inspired word of God, the search will be fruitful of evil, and productive

¹ Ex. 21:28, 29.

² Ex. 22:6.

³ Levit. 19:36.

⁴ Ex. 21:12–14; Deut. 19:11–13.

⁵ Deut. 22:25.

⁶ 24:7.

⁷ Ex. 22:19; Levit. 18:23; 20:15, 16; Deut. 27:21.

⁸ Levit. 20:17.

of no good. As already incidentally noticed, the Mosaic code has been subjected to severe and unjust, and, it may be truthfully added, *ignorant*, criticism by hostile writers. By way of further illustration of these unjust criticisms may be mentioned the oft-repeated allegation that the Mosaic criminal code, if truly presented in the Bible, was cruel and barbarous, notably in its large number of crimes punishable with death, some of which were minor offenses. The very able public writer from whose great work on the ancient Hebrew laws liberal quotations have been made in this chapter, speaking of the criticism in question, says:¹ "Loud complaint has been made against Moses on account of the number of crimes made capital in his code. But great injustice has been done him in this particular. The crimes punishable with death by his laws were either of a deep moral malignity or such as were aimed against the very being of the state. It will be found, too, on examination, that there were but four classes of capital offenses known to his laws — treason, murder, deliberate and gross abuse of parents, and the more unnatural and horrid crimes arising out of the sexual relation. And all these specifications under these classes amounted to only seventeen; whereas, it is not two hundred years since the criminal code of Great Britain numbered one hundred and forty-eight crimes punishable with death, many of them of a trivial nature, as petty thefts and trespasses upon property." The work of Dr. Wines, from which the foregoing quotation is taken, was published in 1853, and it cannot, therefore, be much, if any, more than two hundred years ago that the English criminal code of which he speaks was in force; and it was fourteen centuries or upwards prior to that time that the Mosaic code was enacted. Nothing further need

¹ Wines, *Laws of the Anc. Heb.*, p. 263.

be said in answer to the criticism in question. Other criticisms will disappear on intelligent investigation.

It is essential to a correct understanding of the Hebrew constitution and laws, first, that they be studied in view of the fact that they are an expansion of the Decalogue, designed to teach and enforce the duties of man to his Maker and to his fellow-men; and secondly, that they were adapted to the existing conditions of society in that early and rude age of the world. Thus honestly studied, the divinely-inspired Mosaic code will reveal itself as the masterpiece of legislation among all the codes of the world.

For the convenience of readers who may wish to investigate the Hebrew constitution and laws more thoroughly, the names of a few of the leading works on the subject are subjoined, viz.: Wines' *Laws of the Ancient Hebrews*, Harrington's *Commonwealth of Israel*, Dr. Spring's *Obligations of the World to the Bible*, Jahn's *Hebrew Commonwealth*, and Michael's *Commentary on the Laws of Moses*.

CHAPTER XIII.

THE ROMAN OR CIVIL LAW.

SECTION 106. Introductory.

107. The Twelve Tables.

108. From the Twelve Tables to the Emperor Justinian.

109. The *Corpus Juris Civilis*.

(1) The Code.

1. Orations.

2. Edicta.

3. Mandata.

4. Decreta.

5. Rescripta.

(2) The Institutes.

(3) The Digest.

(4) The Novels.

110. Subjects and features of Roman jurisprudence.

111. Some explanation of the wide prevalence and great influence of Roman law.

§ 106. **Introductory.**—The Roman or civil law invites our study, not only by its historic interest and intrinsic character, but by reason of its liberal contributions to other national systems of jurisprudence, and especially for its influence upon our own municipal law. In searching the records of the past for the sources and inspiration of the principles which permeate and animate the great body of our juridical law, both written and unwritten, we are led back unerringly to the Mosaic code and the Roman law. Among the uninspired systems of juridical law known to history, Roman jurisprudence, in the periods of its best development, stands pre-eminent for its wisdom, equity, and wide dominion.

Of the Roman law Chancellor Kent says:¹ "The history of the venerable system of the civil law is peculiarly interesting. It was created and gradually matured on the banks of the Tiber, by the successive wisdom of Roman statesmen, magistrates and sages; and after governing the greatest people in the ancient world for the space of thirteen or fourteen centuries, and undergoing extraordinary vicissitudes after the fall of the western empire, it was revived, admired and studied in modern Europe on account of the variety and excellence of its general principles. It is now taught and obeyed, not only in France, Spain, Germany, Holland, and Scotland, but in the islands of the Indian Ocean, and on the banks of the Mississippi and the St. Lawrence. So true, it seems, are the words of d'Aguesseau, that the grand destinies of Rome are not yet accomplished; she reigns throughout the world by her reason, after having ceased to reign by her authority."²

The early history of the Roman law is somewhat obscure and subject to conflicting accounts. But the record of its most important development, that which has given exceptional prominence and influence among the juridical systems of the past, is well preserved and accessible to students for professional or general educational purposes.

In this chapter an outline view will be presented, designed to furnish a general knowledge of the character and history of the system and to serve as a convenient guide to a more thorough study of the subject.

§ 107. The Twelve Tables.— The earliest collection of the Roman laws of which history takes notice was com-

¹ Kent's Com., p. 514.

² See Pom. Munic. Law, §§ 2-9, 291; Hadley's Introd. to Roman Law, p. 2 *et seq.*; Reeve's Hist. of Eng. Law (Fin. ed.), Introduction, vol. I, p. xxi *et seq.*; 1 Bl. Com., p. 80 *et seq.*; 1 Cooley's Bl., p. 79 *et seq.*

piled about 300 years after the founding of Rome, in the year 753 B. C., and is familiarly known as the Twelve Tables. It will be recalled by students of history that in the early period of the Roman state the people were divided into classes, the patricians and the plebeians; the former constituting the aristocracy, the latter comprising the common people. As natural and usual, where class distinctions exist in society, fostered by law, jealousies were engendered, hostile conditions arose between the two orders, resulting in violent and ever-recurring struggles. The patricians at an early period monopolized the offices and functions of government, and in their greed of power, growing with its possession and enjoyment, they grievously oppressed the plebeians. The latter, with the leaven of manhood divinely hidden within them, resisted the oppressions of their superiors in rank, and strove earnestly for that political equality which is the birth-right of all men. These struggles resulted in the repulsion of the kings, and the establishment of a consular government. For about twenty years thereafter Rome was governed without any written laws or known public rules; and the people, especially the plebeians, began to suffer seriously for the want of certain and stable laws, and from the "absolute and capricious power of consuls beyond the walls of the city." The royal laws had been abrogated, and had ceased to exist, except indirectly by the force of usage. The patricians, who still retained to a large extent their ascendancy in the state, were quite ready to take advantage of this condition of the state; and the magistrates, taken from this rank, and being a law unto themselves, carried things with a high hand, oppressing and harassing the lower order. The patricians at length reluctantly assented to the demand of the plebeians for a code of written laws, which, being certain and known, would relieve them from the despotic rule of their supe-

riors in rank, define, secure and protect their rights. Steps were thereupon taken which resulted in the establishment of the Twelve Tables.

It is unequivocally stated by distinguished publicists that about the year 451 B. C. a commission was sent to Greece to study the laws of Solon and Lycurgus, for the purpose of obtaining useful suggestions for the formulation of the contemplated Roman code.¹ It should be noticed, however, that the truth of this statement is questioned by other writers of note.² Practically it may be regarded as a question of little importance at present, whether this report be fact or fiction, the value and influence of Roman jurisprudence is due to its development at a later period of history.

On the return of these commissioners,—if such these were,—and about the year 452 B. C., ten persons were appointed under the name of decemvirs and directed to collect, arrange and reduce the whole law into a compact form. The result of their labors appeared about a year thereafter, in the form and arrangement of ten tables. In the following year two other tables were added, the whole constituting the historic Twelve Tables, frequently denominated the Decemviral Code, from the first ten commissioners.

The arrangements of the laws of the Twelve Tables is thus given by Prof. Pomeroy:³ “Tables 1 and 2, forms of judicial proceedings; table 3, the law of loans, bailments, etc.; table 4, the law of parent and child; table 5, the law of inheritance and wardship; table 6, the law

¹ Pom. Munic. Law, § 89; 1 Kent, Com., p. 520; Niebuhr, History of Rome, vol. 1, p. 211.

² Hadley's Intr. to Roman Law, p. 75; and see 1 Kent, Com., p. 520, note c.

³ Pom. Munic. Law, § 89; Hadley's Introd. to the Roman Law, pp. 74-76; 1 Kent, Com., pp. 515-521; Pomeroy's Munic. Law, p. 49.

of property and possession; table 7, the law of damages; table 8, the law of servitude; table 9, the public or political law; table 10, the law as to funerals; table 11, the pontifical law; table 12, the law of marriage and divorce."

This code, it is thought by publicists, was in the main a digest of the preceding statutory and customary laws, of which but little is certainly known. But from what is known and reasonably conjectured of pre-existing laws, it may be safely affirmed that they were simple, formal, and severe, suited to the character and condition of the Roman people at that early period of their history. And the same may truthfully be said of the legislation immediately succeeding the Twelve Tables, especially in comparison with the great body of enlightened and liberal Roman jurisprudence given to the world in its later development.

§ 108. From the Twelve Tables to the Emperor Justinian.—For convenience of treatment and study, the time extending from the establishment of the Twelve Tables to the commencement of the Emperor Justinian's reign may be classed as the second period in the history of Roman jurisprudence. This long reach of time, covering 978 years, from B. C. 451 to A. D. 527, witnessed great changes in Roman history and the Roman law. The time and space allotted to this chapter will permit only a general view of this long period. But a detailed and critical discussion of the varied conditions, and the development of Roman jurisprudence during these passing centuries, would be of little practical importance, comparatively, as the great law reform under Justinian overshadowed all the past of Roman law, and gave to that system its great renown and wide influence among

nations. While, however, a full discussion of this period is comparatively of small importance, it is not devoid of historic interest, and it may on that account be acceptable to a class of readers. Such a sketch, moreover, may serve as a helpful introduction to the study of Justinian jurisprudence.

Prof. Pomeroy writes:¹ "During this time Rome had passed through the glories of the republic and empire, and into its rapid decline; she had emerged from the provincial rudeness of the early period into the culture in arts, letters and intellectual activity of the Augustan age, and had again partially sunk into the embraces of barbarism. Her god Terminus had steadily reached to the confines of the known world, had there maintained his firm stand for generations and dynasties, and had receded until even Italy and the imperial city itself had been yielded to the invaders. During these ten centuries the Roman law had made a progress equal to that of the Roman arms. It had been developed by senate decrees, by resolutions of the assemblies, by the edicts of magistrates, by the writings of jurists, and by the constitutions of emperors. And now the animating life had departed; the law was no longer a growing organism, instinct with vitality, the variable exponent of the nation's civilization. The time for a codification had arrived."

This general and comprehensive view of Roman history and law during the period in question may be accepted as a truthful picture; but an analytical account in detail, claiming to be complete and accurate, would be less entitled to command full credence. This by reason of the obscurity in which some portions are involved, the paucity of materials accessible for the reconstruction of

¹ Pom. Munic. Law, § 91.

other portions, and the legendary character and questionable authenticity of still other portions. Chancellor Kent remarks:¹ "I am quite reconciled to the observation of Dr. Arnold, in his profound and learned 'History of Rome,' vol. i, 100, 'that although the legends of the early Roman story are neither historical nor coeval with the subjects which they celebrate, still their fame is so great and their beauty and interest so surpassing, that it would be unpardonable to sacrifice them altogether to the spirit of inquiry and fact, and to exclude them from the place which they have so long held in Roman history.'"

Among the contributions to Roman jurisprudence subsequent to the Twelve Tables was the Prætorian law, composed of the edicts of the prætors.² The old strife for power between patricians and plebeians had continued with variable results, but on the whole to the advantage of the latter. By a law passed in the year of Rome 384, the office of consul, theretofore confined to the patricians, was opened to the plebeians. At the same time the office of prætor was instituted, to whom the judicial power was transferred from the consular office; and it was provided that the prætor should be taken only from the patrician order. This transfer and limitation of judicial power, it is assumed with reasonable probability, was intended as a compensation to the patricians for their loss of power and dignity in the triumph of the inferior rank. But whatever may have been the motive for this change, its effect was good; the judicial decisions of the prætors became an important component of the Roman law. In the progress of events the number of prætors was increased from time to time, as the

¹ Kent, Com., p. 518, note b.

² Pom. Munic. Law, p. 110 *et seq.*

judicial wants of the people required, until it reached eighteen; and at length plebeians became eligible to the office. It was a peculiarity of the prætorian judicial system that every magistrate of the order, on taking office, was required to establish and publish certain rules and forms for his guidance during his official term. He was bound by such of the rules of his predecessors only as he might choose to adopt; but it is reported that "the edicts of the prætor were generally declaratory of the customary unwritten law and practice of his predecessors." It is not, however, incredible that ambition or self-conceit led some of the magistrates to prefer and adopt their own rules to the exclusion of those established by their predecessors; and that baser motives impelled others, at times, to fraudulently depart from their own established codes. To prevent the latter evil a law was passed peremptorily requiring the prætor to adhere strictly to his initiatory edicts. While, on the one hand, this practice would tend to guard the citizen against arbitrary and capricious judgments, on the other hand it lacked the flexibility of unwritten principles, applicable to the ever-varying circumstances presented for adjudication, requiring the exercise of judicial discretion on the part of the magistrate. Whatever may be thought of the merits of this system, viewed in the light of the present, the prætorian edicts took a prominent place in the Roman law, largely superseding the Twelve Tables, which had theretofore been the leading national code. Notwithstanding the statutory restrictions by which it was sought to bind the prætors to precedent and form, they gradually yielded to the progressive spirit which animated the people, and the changing conditions and wants of society, so that under their administration of the law the character of the judicial procedure was largely modified and liberal-

ized. Under a strict and literal construction of the law, no judgment could be awarded a litigant except what was strictly confined to prescribed forms, however clearly the evidence might show a party entitled to other or further relief. The changed and more liberal prætorian practice permitted the defendant to plead and give evidence of facts, which, though not admissible under the strict construction rule, allowed that it would be inequitable to grant the judgment sought by the plaintiff. In other words, an equitable defense was allowed in legal actions. To effect this important change, the prætor adopted the practice of adding to the formula of pleas the direction that the index or arbiter, as the trial judge was called, should do what was right between the parties. This unlimited authority enabled the judge to consider all the facts connected with the case, and give to each its due weight in his decision; it would allow a counterclaim growing out of the same transaction; it permitted the judge to declare the instrument or contract constituting the plaintiff's cause of action void by reason of fraud or force. The prætor further advanced in the same liberal line by providing new and adequate remedies in cases for which no provisions were made in the old law, still nominally in force. A point was eventually reached when the judge was required to enforce *equity* between the parties, without regard to the strict letter of the ancient rule. Under this enlargement of judicial power, a court, by whatever name designated, became essentially *a court of equity*. Trusts, injunctions, and other subjects, at present generally assigned to distinctive courts of equity, were cognizable in the nominal courts of law.¹

These and other changes in the progressive development of Roman jurisprudence were gradual, covering a

¹1 Kent, Com., p. 530.

long succession of years prior to the reign of Justinian. It is not requisite for a general knowledge of the subject that all the stages in this development should be specially noticed; and our space would not permit a detailed historical discussion. There is one feature, however, that has too much interest for the legal profession to be wholly overlooked in passing. It is what was termed the *responsa*, or *interpretationes prudentum*, consisting of the opinions of learned lawyers, given in response to questions submitted for their consideration. The valuable services of these distinguished jurists were gratuitous, and by reason of their intrinsic worth were gradually adopted by the courts, and became a part of the common or unwritten law. In time this practice developed into a public profession, and raised law to the dignity of a science which was taught both in private houses and schools. This important contribution to the Roman law of that age is not, it seems, preserved in any distinctive body; but doubtless more or less of its principles and precepts were incorporated into the great body of Roman jurisprudence, unacknowledged, and are still living principles among civilized nations, while their respective authors are unhonored dust. Chancellor Kent says: ¹ "Cicero speaks of this employment of distinguished jurists with the greatest encomiums, and as being the grace and ornament and most honorable business of old age. The house of such a civilian becomes a living oracle to the whole city; and this very accomplished orator and statesman fondly anticipated such a dignified retreat and occupation for his declining years."²

During the long period under review various mutations

¹ 1 Kent, Com., p. 531.

² 1 Kent, Com., p. 531. And see Cic. d'Orat., L. 45; and Quintilian's Inst., lib. 12, c. 11.

occurred in the Roman law which have not been already noticed, and which must yield in this outline survey to more important and enduring features. Compilations of the unwritten law, of greater or less value, were made at different times which served their day, but which are not preserved in distinctive bodies. But fragments of those compilations, or codes, as some of the more important were called, are found in the legislation of Justinian. These ancient codes possess only antiquarian interest, as they are obsolete, swallowed up and superseded by the *Corpus Juris Civilis*, created under the Emperor Justinian, which gave to Roman jurisprudence its great fame, wide influence and enduring character. Perhaps, however, a due regard to strict historic truth requires some modification of this indiscriminate consignment to oblivion of antecedent compilations in favor of the Theodosian code, compiled about a century prior to Justinian, which, to a larger extent than others, had maintained its integrity and identity down to the imperial code of that emperor.

§ 109. **The Corpus Juris Civilis.**—Among all the compilations of Roman law of which history has left any trace, the *Corpus Juris Civilis* is *facile princeps*, and it remains to this day a monument to the wisdom of Justinian, under whose reign and patronage it was produced, and to the learning and executive ability of the eminent jurists who executed the work. Some comprehension of the magnitude of this work may be gained by considering the fact that it was given to the world about a thousand years after the founding of Rome and three centuries after the establishment of the Twelve Tables; and that during this long period Roman law had undergone great changes and was in a confused condition. The reform conceived by Justinian and executed by his learned agents required a review of the whole accessible field of Roman

jurisprudence, the elimination of all incongruous and outgrown elements, and the crystallization of the remainder into a compact and symmetrical body. The completed work embraced the following divisions:

(1) *The Code*.— This was intrusted by the emperor to a commission composed of ten eminent lawyers, with Tribonian at the head, who was regarded as the first jurist of that age. They were required to codify the *constitutiones*, as they were termed, which were what might be appropriately denominated crown laws, being emanations from the emperor. They embraced:

1. *Orations*, proposals of law, submitted by the emperor to and adopted by the senate. 2. *Edicta*, laws issued directly by the emperor in his sovereign capacity. 3. *Man-data*, instructions given by the emperor to officers of law and justice. 4. *Decreta*, decisions pronounced by the emperor in cases brought before him for adjudication by appeal or otherwise. 5. *Rescripta*, answers returned by the emperor to questions by parties litigant or by magistrates. The wisdom of Justinian in the selection of his commissioners was shown in the result of their labors, which were completed, sanctioned by the emperor and published in the short space of fourteen months. The work was subsequently revised under the supervision of Tribonian, and completed in twelve books, A. D. 534.

(2) *The Institutes*.— Following the Code was a work of Tribonian and two associates in four books known as "The Institutes." These books contained in a condensed body and an orderly arrangement the elements of the Roman law, designed especially for students at law. So well was this work suited to its purpose that it was adopted as a text-book in the law schools at Berytus, Rome and Constantinople, and it has survived to modern times, passing through numerous editions.

(3) *The Digest*.—Next in the order of law reform came the Digest, the most important constituent of the *Corpus Juris Civilis*, or *Pandects*, as it was sometimes called from the meaning of the term, “all receiving,” indicating its numerous sources. It was the work of a commission appointed by Justinian, comprising Tribonian with sixteen associates. The instructions of the emperor to these commissioners required them “to read and correct the books which had been written by authority upon the Roman law, and to extract from them a body of jurisprudence in which there should be no two laws contradictory or alike, and that the collection should be a substitute for all former works; that the compilation should be made in fifty books, and digested upon the plan of the perpetual edict, and contain all that is worth having in the Roman law for the preceding one thousand four hundred years, so that it might thereafter be regarded as the temple and sanctuary of justice.” He directed that the “selection be made from the civilians and the laws then in force, with such discretion and sagacity as to produce in the result a perfect and immortal work.”¹ Ten years were allowed for the performance of this great work; but so diligent and skilful were the commissioners that at the end of three years their completed work was given to the public. Soon thereafter the emperor issued an edict confirming the authority of the Digest, and expressly prohibiting the civilians of his time, and of all future ages, from writing any commentaries upon it, on pain of being subject to the *crimen falsi*, and having their commentaries destroyed. Justinian, it is said, assigned as a reason for this extraordinary prohibition, a desire to prevent his laws from being disfigured and disordered by the glosses of interpreters; but it is possible

¹ 1 Kent, Com., p. 540.

that personal vanity may have had some influence with the emperor, who is credited by historians with a liberal endowment of that human element. But whatever the motive for it, the prohibition itself, in the light of the present, looks supremely absurd; not less so indeed than the important command imputed to King Canute, addressed by him to the resistless tide of the sea. And just as little effect did it produce; for, in utter disregard of the emperor's prohibition, numerous commentaries upon the Digest were given to the public.

The characteristics and merits of the Digest are admirably stated by Prof. Hadley as follows:¹ "The Digest is in fact the soul of the Corpus, which without it would seem almost a *cadaver*, the corpse or skeleton of itself. It is the characteristic element which distinguishes this from other codes, ancient and modern, and gives it the undeniable superiority. In most codes we have, from beginning to end, only a dry, categorical, imperative 'thou shalt,' 'thou shalt not,' 'do this and live,' 'avoid this, abstain from that, or suffer the penalty.' But in the Digest we have definitions, maxims, principles, applications, distinctions, illustrations — all in endless abundance and variety. It is as if one should make a compend of English law by selecting the most judicious and accurate statements from treatises like those of Blackstone and Kent, and the most pithy, pointed, luminous utterances from the decisions of judges like Mansfield, Scott, Marshall and Story, and placing them together in an arrangement which, if not altogether scientific, should be, at least, practically convenient, natural and easily comprehended. A digest constructed on this plan was in the highest degree fitted to be a teacher of law to after-times; for it shows the spirit of the law, the principles of equity

¹ Introduction to the Roman Law, pp. 11, 12.

on which it is founded, the reasonings and methods by which it is built up as a rational, intelligible and orderly system. No other code has been so well adapted to stimulate, develop and discipline the juristic sense; the great office which the *Corpus Juris*, operating mainly through this part of its contents, has discharged for mediæval and modern Europe."

(4) *The Novels*.—After the publication of the Digest, ordinances were passed from time to time by Justinian, to correct errors and supply omissions found in existing legislation, and to meet new exigencies in the state. A collection of these imperial ordinances, arranged in order of time, constituted the *Novels*, the last formulated component of the famous *Corpus Juris Civilis*, which gave to Roman law pre-eminence among national codes, and its wide sway in foreign lands.

§ 110. Subjects and features of Roman jurisprudence. Our assigned limits permit only a brief and cursory view of a broad field, confining the discussion to private law at the maturity of the Roman system. In the long succession of ages, Roman law, at first narrow, severe and technical, had, at the close of Justinian's reign, become broad and liberal in its spirit, principles and administration. Since Justinian it has been subject to changes with the changing conditions of society and business affairs, as are all juridical systems. But notwithstanding incidental and minor changes, the grand system of Roman jurisprudence has not only maintained its standing and integrity on its native soil, but has extended its dominion to other lands, and, to a greater or less extent, has infused its spirit into most, if not all, the systems of jurisprudence among civilized nations.

For convenience of treatment and study, and the ad-

ministration of justice, Roman law, like all juridical systems, is divided into two general classes: the law of *persons* and the law of *things*. The former, strictly defined, embraces the latter, the law of things being simply the legal relations of persons to things which, independent of persons, have no place in juridical law. The two general classes, persons and things, have each their subdivisions which will be observed in our brief treatment of the subject.

First. The law of persons.—Under the Roman government the people were divided into two classes: *freemen* and *slaves*. The latter class was composed of three elements: First, those born of slave mothers; second, persons taken captive in war; and third, those suffering themselves to be sold into servitude. In primitive times the power of the master over his slave was supreme and irresponsible, extending even to life and death. The slave possessed no rights under the law, being only a personal chattel of the master, as much so to all intents and purposes as his horse. There were but two ways in which a master could manumit his slave; one by a public solemn act before a magistrate; the other by a last will and testament. Doubtless there were humane masters; but it must be acknowledged that in the early days of Roman history its system of human slavery was barbarous and cruel in the extreme. But in the age of Justinian, the ancient rigor of the system had been greatly softened under the benignant influence of Christianity and advanced civilization. Facilities for manumitting slaves were increased, and freedmen might attain to the dignity and rights of a Roman citizen. It is an interesting fact to the people of the United States, that slavery, when it existed here, was governed mainly by the Roman code. For example, the condition of the child followed that of

the mother; if she were a slave, her child would be born to the same condition, whoever might be the father; while children of free mothers were born to freedom.

Husband and wife.—The basis of a legal marriage was the consent of the parties; but where either party was under lawful paternal power, the parent's consent was also requisite. The lack of the parent's voluntary consent, however, was not necessarily fatal to the hopes of the children; if a parent unjustly withheld his consent to the marriage, he might be compelled by a magistrate to give it, and with it the requisite dowry. The law made it the duty of the father to give his daughter a suitable marriage portion, graduated by the amount of his property, due regard being had to the rights of his creditors. On the wife's death the dowry given by the father returned to him. It was also provided that the wife's dowry might be taken from her own property; and when of full age at the time of her marriage, she might herself set apart a portion of her property for the purpose. In such case, the husband added a portion of his property, which, with that contributed by the wife, was used for their mutual benefit. But during the marriage the husband had full control of the whole, and was entitled to the rents and profits for the support of the family. If the wife owned separate property in addition to her dowry, it was her own absolutely, entirely free from the control of her husband. It must be added in obedience to historic truth, that the wife was under the power of her husband; but this power, at the time of which we write, was very different in extent from that which characterized the relation at an early period of Roman history. It meant simply that the husband was the natural and rightful head of the family, with the power of controlling family affairs. At an early period the condition of the

wife was quite different, and as deplorable as any modern reformer could possibly desire for a picture of woman's wrongs. Her liberty and life, even, were in her husband's hands. He was her lord and master, her lawgiver and judge. The only relief to her condition was the great freedom of divorce, which, mercifully, belonged as well to the wife as to the husband; either party might terminate the marriage at will. When, under the influence of Christianity, the husband was shorn of his absolute, irresponsible power, and the condition of the wife during marriage had become greatly ameliorated, the freedom of divorce was restricted, so that the marriage bond could only be severed for a few specified causes.

Parent and child. Next in natural order for consideration is the relation of parent and child, which, in outline, may be briefly described. In theory, and in practice at an early day, the family government was an absolute despotism. The father was the despotic head, and the unquestioned ruler. His power extended not only over his children born in lawful wedlock, and his children by adoption, but over the male children of his sons and their wives, and their daughters until marriage. Over all these he was the absolute, irresponsible head and chief; his power extending to their persons and property, not only, but also to their liberty and lives. At a later period of Roman history the severity of this law was greatly softened, and its ugly features were to a large extent obliterated.

Tutor and pupil.—The relation expressed by this heading is substantially the same as that termed *guardian and ward* in English and American law. Under the Roman system, male children under the age of fourteen, and females under the age of twelve, were subjects for guard-

ianship. A father had the right to appoint guardians for his infant children by his last will. In default of such appointment, the office devolved upon the relations of the infant on the father's side. And in default of either of these, the appointment might be made by a prætor or president of a province. With males, this guardianship continued till the age of fourteen, with females till the age of twelve. Then followed another species of tutelage or guardianship, termed a *curatorship*, which continued till the children reached the age of twenty-five. These guardians were appointed by magistrates, and were required to give security for the faithful discharge of their duties. They were under the control of the prætors, who were authorized to supervise them in the discharge of their trust, and compel them to account; and who also had the power to remove them from office in case of fraud or unfaithfulness in the discharge of their duties.

In these, as well as in many other provisions of the civil law, may be seen a strong family resemblance in features of American municipal law.

Second. The law of things.—In treating briefly of this division, no notice will be taken of those things which were not regarded by the Roman law as the subjects of private property. Things which were so recognized by that law, and are now generally so classed in the juridical systems of other nations, were and are divided into two kinds: *corporeal* and *incorporeal*. Things of the former class, it hardly need be said, were tangible, such as houses, lands, goods and chattels; while the latter in the Roman law consisted of legal rights merely. For example, the right or privilege of way which the owner of one tenement may have over the lands of an adjacent owner, called at common law an easement, and in the Roman law a servitude.

In the Roman law there were four methods of acquiring property in specific or individual things, namely: occupancy, prescription, donations of two kinds, *inter vivos* and *causa mortis*, and sales. Each of these methods had its peculiar rules, the discussion of which our limits will not permit. It may be stated, however, that in English and American law, these methods and rules are, to a large extent, copied or reproduced, although differing in some particulars.

There were in the Roman law, also, four methods of acquiring property in the whole estate, namely: first, by a last will and testament; second, by succession to the estate of an intestate; third, by adrogation; and fourth, by a judicial sale of the effects of an insolvent. While some of the general features of these methods are found in English and American law, the Roman system had some provisions peculiar to itself. Especially is this true of the law governing last wills and testaments. And the third method of transfer mentioned above, that of adrogation, is unknown to English and American law. This transfer was effected by a person of full age and not under another's power, and having property, causing himself to be adopted by another. The person adopting took the whole estate, and became liable for the debts. The fourth method, that of succession by the sale of the debtor's property, was in operation and effect substantially like the bankrupt and insolvent laws in the United States.

Of obligations.—The term "obligation," in the Roman law, is more comprehensive than the same word in the English or American legal nomenclature. In either the term *contract* comes the nearest in significance of any word in its terminology to the Roman word *obligation*; but it is much narrower in scope, contracts being only

one species of obligations known to the Roman law. In the early history of that system it was considered that obligations derived their force solely from positive law. But later, under prætorian jurisdiction, new methods of creating obligations were introduced, and the means of enforcing them provided. Following other changes, Justinian made a new classification founded upon the methods of creating obligations. Under this classification obligations were characterized as *ex contractu* or *quasi ex contractu*, and *ex maleficio* or *quasi ex maleficio*. This classification, modernized and expressed in plain English, embraces four kinds, namely: First, obligations arising from express contract; second, those arising upon implied contracts; third, those arising from actual or direct wrongs; and fourth, those arising from constructive wrongs. Some of these classes by name, and all in substance, may be found in works upon the common law, under the general head of "contracts." What distinguishes obligations under the Roman law from contracts in the common law more than aught else is the fact that in the former obligations arise *ex maleficio* or *ex delicto*; whereas, at common law, contracts and torts are separate and distinct, both in their character and judicial treatment.

§ 111. Some explanation of the wide prevalence and great influence of Roman law.—We have seen¹ that the private law of Italy, Spain, Germany, France, and other western nations of the European continent, is based largely upon that of Rome; and that the spirit of Roman jurisprudence has animated the juridical systems of other civilized nations. The question naturally arises, Why all this? To trace the history of Roman law, and answer

¹ *Ante*, § 106.

the question intelligently and fully, would require a volume instead of one section of a single chapter. It may, however, be answered briefly and comprehensively in a general way, as follows: First, by conquest of Roman arms; and secondly, by its intrinsic excellence and contagious character. But many causes and influences conspired to give it extensive favor and authority. Among these may be mentioned, as prominent, the fact that it became a branch of polite literature and constituted one of the accomplishments of a liberal education. What may, perhaps, be justly regarded as a more important factor in the problem is that Roman law was generally favored by the clergy, whose authority and influence in some periods of history has been exceedingly potent, even in affairs of state. It sometimes came to pass in the march of conquest that in matters of private law and personal rights Roman jurisprudence completely dominated in the conquered territory; while in other instances the conquered were permitted to retain their own ethnic customs and laws for their government in matters of personal and private concern, the conqueror at the same time adhering in other respects to the Roman law. When tracing the conquests of the Roman system in other states, it should be kept in mind that it was the *private* law of Rome that gained such wide authority. Forms of government change with time and place; but fundamental principles of private right remain the same through all ages and all systems of government and public law.

The foregoing sketch, in outline of the history and character of the Roman or civil law, is all that the limits of a single chapter would permit; but enough, it is hoped, to stimulate an interest in a system which fills so large a space in the jurisprudence of civilized nations and point the reader to methods and facilities for a full investigation of the subject.

Did space and the plan of this work permit, it would be interesting and instructive to trace the history of this remarkable system of jurisprudence since the time of Justinian and take note of all its conquests beyond the limits of Roman territory; but passing reference to France, only, can be indulged. In several of the foreign states, where the Roman law took root, codes more or less pretentious and valuable were published, being mainly, it is said, mere compilations of Roman jurisprudence. These had their brief day and passed out of use, giving place to more valuable and enduring juridical literature. To these ephemeral compilations the famous French Code "Napoleon" is a notable exception, both in character and endurance. The work was undertaken by the Emperor Napoleon and accomplished under his personal supervision, with the assistance of the best legal talent available. Its character and permanence is an enduring monument to the genius and indomitable will of Napoleon, and to the learning and wisdom of the great jurists whose co-operation contributed to the success of the undertaking.

Napoleon was justly proud of this achievement, and, from what is known of the emperor and this work, it is not incredible that, on its completion, he exclaimed, as he is said to have done, "I shall go down to posterity with this code in my hand."

As the nature of the subject and the general manner of its treatment have made it difficult to cite particular authorities for every proposition or statement, a list of a few leading works on Roman law and history is appended for the benefit of readers who may wish to make a more thorough study of the subject.

Authorities.—Pothier; Cujas; Domat; Heineccius; Hugo; Savigny; Niebuhr; Eicchhorn; Häubold; Pom-

eroy's Municipal Law; Hadley's Introduction to Roman Law; 1 Kent's Commentaries, Lecture XXIII; Blackstone's Introductory Vinerian Lecture at Oxford, 1 Bl. Com.; Introduction to Finlason Edition of Reeve's History of the English Law, vol. I, New American Ed., 1880; Gibbon's History of Rome; 1 Cooley's Blackstone, pp. 18-20, 79 *et seq.*; 2 *id.*, p. 419; Corpus Juris Civilis (Eng.); Gaius (Abdy & Walker); Hunter's Roman Law (Eng.); Justinian (Abdy & Walker); Voet's Pandects (Eng.); Williams, J.; Institutes of Justinian.

CHAPTER XIV.

ROMAN LAW IN ENGLAND.

SECTION 112. Its first introduction.

113. Its decadence and revival in England.

114. Civil and canon law in English courts.

As the principles of Roman jurisprudence largely pervade American law, especially the common law, the main body of which is an inheritance from the mother country, it may be useful to take some further notice of the Roman law in England.

§ 112. *Its first introduction.*—It will be remembered by students of history that Britain was invaded by the Romans, under Julius Cæsar, in the year 55 B. C., and that after a long and severe struggle the subjugation of the country was completed by the Roman general Agricola. Roman laws, following the conquest of Roman arms, were introduced and administered in Roman tribunals by illustrious prætorian prefects. The Roman dominion continued about four hundred and seventy-five years, when the island was left to its original possessors, the Celtic tribes.¹ To what extent the invading law had impressed itself upon the institutions of the country during the long period of its dominance, and taken root, it is now difficult to determine satisfactorily. It must have made considerable impression upon the civilization and laws; but less, it is probable, than in other continental states whose soil was more congenial to its nature.

¹1 Kent's Com., p. 545.

§ 113. **Its decadence and revival in England.**— For the single purpose of showing how it obtained a permanent standing and influence in England, it is unnecessary to pay strict attention to chronology. Passing over a long period of intervening history, during which great changes in the condition and government of the English people occurred, including the Anglo-Saxon and Norman conquests, we come down to a time in the twelfth century when the study of Roman jurisprudence was revived on the continent, and introduced permanently into England.

Here occurs a perplexing hiatus in the history of the Roman law. A revival assumes an antecedent decline; and such a decline there was, indeed, in the study and dominance of Roman jurisprudence, which commenced on the conquest of Roman territory by northern barbarians soon after the completion of the *Corpus Juris Civilis*, and continued till about A. D. 1130. But as to what extent the Roman law became unknown and inoperative during this long period juristic writers are not agreed; nor is there entire agreement respecting the causes and circumstances of its revival in England. It was quite generally supposed at one time by eminent jurists that soon after the revision of the Roman law by Justinian it fell into neglect and oblivion till about A. D. 1130, when a copy of the Digest was found at Amalphi by the German emperor Lothaire II., A. D. 1136. This copy was declared by some to be the one which Justinian himself had for his own private use.¹ It is quite probable that there is more or less fiction in accounts of the alleged finding of this mysterious copy. There is, how-

¹ See 1 Kent's Com., p. 546 *et seq.*; Pom. Munic. Law, §§ 600-609; Hadley's Introduction to Roman Law, pp. 45-48; 1 Cooley's Bl., pp. 16-18.

ever, it seems, a very ancient manuscript copy of the Digest preserved in Florence, which is regarded as the oldest and most valuable copy extant. This may be the mythical Amalphan copy. But the story of the Justinian code being unknown in Italy from the sixth to the twelfth century, and its discovery at Amalphi, is discredited by Savigny and others.

It is true, however, that about the time of this alleged discovery there was a remarkable revival of interest in the study of Roman law on the continent, which extended into England.¹ Doubtless this was due in part to a general quickening of the European mind which followed the darkest period of the Middle Ages. Another cause for this revival is found in the study of Roman jurisprudence in the famous law school of Bologna, in which the Justinian code formed the basis of all the instruction.² "A crowd of students," it is said, "from all parts of Europe carried to their own countries the new-born science, propagated it by their writings, and especially taught it in their universities." Says Chancellor Kent:³ "After the Roman jurisprudence had been expelled by the arms of the northern barbarians, and supplanted by the crude institutions of the Anglo-Saxons, it was again introduced into the island, upon the recovery of the Pandects, and taught, in the first instance, with the same zeal as on the continent."

But a rivalry, nay, a bitter hostility, soon arose between the friends of the common law and the champions of the Roman law, which seriously impeded the progress of the latter to ascendancy in those departments of juridical jurisdiction to which it was especially adapted, and to

¹ See authorities last cited.

² Pom. Munic. Law, §§ 607-609; 1 Cooley's Bl., p. 18.

³ 1 Kent's Com., p. 545.

which it ultimately attained.¹ This jealousy and rivalry between the two systems was probably due in part to the ethnic conflicts of the past, accentuated by the stubborn character of the Anglo-Saxon race. It was nursed, also, by the schools; the two universities, Cambridge and Oxford on the one hand, where the civil law was taught and held in high esteem, and the rival law schools at Westminster, where the common law was taught and the civil law disparaged.

Another and prominent cause for the heated controversy between the two systems was the jealousy and strife for power between the bishop and the clergy on the one side, and the nobility and laity on the other. Without attempting to trace this stubborn and protracted conflict through all its history, it may be stated that the common-law courts, as a rule, never recognized the doctrines of the Roman codes as having the force of law. It does not follow, however, that the civil law wholly failed to infuse itself to some extent into the body of the common law, and appreciably modify its iron rules. On the contrary, the history of the English law clearly shows a large indebtedness to Rome for some of its best features.

§ 114. *Civil and canon law in English courts.*—The history of the introduction and prevalence of the Roman law in England would be incomplete without some reference to the English courts in which the civil and canon law took precedence. Brief notice of the English court of chancery has already been taken;² but a further statement of the character and jurisdiction of the several

¹ 1 Kent's Com., pp. 545-547; 1 Cooley's Bl. (Introduction), p. 18 *et seq.*

² *Ante*, ch. VIII, § 79.

courts involved in the struggle under review may be useful.

First, there were the courts of the archbishops and bishops, or the ecclesiastical courts; second, the military courts; third, the courts of admiralty; and fourth, the courts of the two universities.¹

The ecclesiastical courts took cognizance of offenses alleged to have been committed by clergymen, and of encroachments on the property rights of the church. They also claimed and acquired jurisdiction in cases of matrimonial law, including divorce, separation and alimony; and this on the ground that matrimony is a *sacrament*, which it was then held to be, and is still so held by the church of Rome. These courts also obtained and exercised jurisdiction in cases of testamentary law, including the proof and execution of wills; and even the administration of estates whose owners died intestate. To all these cases the ecclesiastical courts applied their own ecclesiastical law, which was founded mainly on the civil law.

Through the court of chancery, also, the Roman law found its way into England. It was not an ecclesiastical court; but its early presiding officers, the king's chancellors, were ecclesiastics, familiar with, and strongly attached to, the civil law. It was but natural, therefore, that they should impress that court with the doctrines and methods of their own familiar and favorite system of law.

From what has been written in this chapter and preceding chapters may be seen the principal ways in which the Roman law infused itself into English jurisprudence.

¹ 2 Cooley's Bl., ch. V, p. 60 *et seq.*; p. 276 *et seq.*; id., ch. XXVII, p. 426 *et seq.*; id., p. 60 *et seq.*; id., p. 83; 1 id., p. 83; id., p. 78 *et seq.*; id., pp. 68, 103; Pom. Munic. Law, §§ 163, 169, 172, 173.

But these were not the only agencies concerned in the work. While the contest between the rival systems had been going on, eminent continental jurists had published learned treatises on the civil law, which fell into the hands of English lawyers and statesmen, and bore fruit after its kind. When the contest had passed its acute stage, the lawyers who had become familiar with Roman jurisprudence, and thoroughly convinced of its excellence, contributed their influence in favor of its naturalization in England. That eminent jurist, Sir Matthew Hale, according to Bishop Burnet,¹ “frequently said that the true grounds and reasons of law were so well delivered in the Digest, that a man could never well understand law as a science without first resorting to the Roman law for information, and he lamented that it was so little studied in England.” And that distinguished and strict common-law judge, Lord Holt, said that “the laws of all nations were raised on the ruins of the civil law, and that the principles of the English law were borrowed from that system, and grounded upon the same reason.”²

¹ Burnet's *Life of Sir M. Hale*, p. 24.

² *Lane v. Cotton*, 12 Mod. Rep. 482.

CHAPTER XV.

ANGLO-SAXON INSTITUTIONS AND LAWS.

SECTION 115. Historical sketch.

116. Anglo-Saxon governmental structure.

- (1) The frank-pledge.
- (2) The tithing.
- (3) The hundred.
- (4) The burgh.
- (5) The shire.

117. Anglo-Saxon jurisprudence.

§ 115. **Historical sketch.**— In searching the records of past ages for the sources of our law, we find in Anglo-Saxon institutions and laws germs of principles, now fully developed, which constitute important elements in English and American jurisprudence. The retrospect covers a lapse of about fourteen centuries, extending backward to the time when the Teutonic people passed from their own country to the island of Britain, from which the Romans had just departed. History informs us that, while at first they acted as friends of the British, and were their auxiliaries against the Picts and the Scots, they subsequently changed from friends to enemies, and succeeded in subduing the original inhabitants, and establishing themselves as the dominant race and ruling power. These Teutonic invaders are said to have been composed of three nationalities, the Saxon, Angles and Jutes, drawn from a confederation of Teutonic tribes, for mutual advancement and protection. The Saxons inhabited the country called North Abingia or Eala Saexen, extending from the Elba to the Eider on the west side of the Cim-

bric peninsula, and divided into Ditmarsia, Stormaria, and Holsatia — districts which still retain these names. The Jutes inhabited South Jutland, now Schleswig. The territory of the Angles is supposed to have been the district of Angein, now within the territorial limits of Schleswig. History is not luminous respecting the events of the century following the advent of these foreigners into the island; but it sufficiently appears that during said period the Saxon element was largely augmented by new arrivals from time to time; and that they founded eight kingdoms, namely: Kent, Sussex, Wessex, East Anglia, Mercia, Essex, Bernicia and Deira, the last two named subsequently merging in Northumbria. Ultimately all these divisions were united into one kingdom called Anglia, or England (Engla-land), by King Egbert of Wessex.

It is unnecessary to occupy time and space in this connection with an account of the vicissitudes, strifes and wars of these kingdoms during their separate existence: that belongs to general history; but brief notice of Anglo-Saxon governmental structure and polity will subserve the purpose of this chapter.

§ 116. **Anglo-Saxon governmental structure.**— At the head of the united kingdoms under Egbert stood the king, called *cynig* in Saxon. At first the king was chosen from among the leaders of the people; but subsequently the office became in a measure hereditary, but not fully so in the modern significance of the term. While the new king must be chosen from the descendants or immediate relatives of the late ruler, a younger son might be, and often was, preferred to the eldest; and a brother's family might be substituted in the succession for the direct heirs, the choice depending in a large measure upon personal qualifications. The king's power was at first

far from absolute, being limited by the power of the supreme council or parliament, called the Witenagemote. The queen (*ewen*) was held in great respect; offenses against her were punished like those against the king; and, like many of her successors in royalty, she often became more than a silent partner with the king in his royal functions and honors, exercising a powerful personality in public affairs.

The æthlings or nobles stood next in rank, including, in early times, only the immediate family and near relatives of the king. The caldorman came next, who stood only a little below the last named, and eventually came to share many of his privileges. This title was at first applied only to the governor of a province, who commanded its forces in war and superintended its affairs in peace; but ultimately this title was borne by officials of many kinds. Although not hereditary in early times, the title became so after the reign of Alfred.

Next in order of rank were the thanes (*thegnas*), who were landholders, and sometimes dignified as an order of nobility by service, on account of their relation to the king as his servants. There were two orders of this class: first, the king's thanes who attended the kings in their courts, and held lands directly from them; and secondly, ordinary thanes who were lords of manors, and who had particular jurisdiction within their assigned limits or thanedoms. Their title generally depended upon a certain amount of landed property held by them, though merchants who had made three voyages of a certain length were also entitled to the rank of thanes. The position of thanes under the government was substantially the same as that of the barons in England after the Norman conquest.

Lower in the scale were the common freemen or churls

(*ceorlas*), who generally held the relation of retainer to some chief. The lowest class of all was that of the slaves (*theowas*), composed of prisoners of war reduced to servitude, of the descendants of Roman slaves, and of those reduced to the grade of slaves as a punishment for crime.

The officials of the church occupied a high position, the archbishop holding the rank and privileges of an ætheling, and the bishop that of an ealdorma. They were also prominent and influential as members of the Witenagemote.

For the administration of public affairs the people were divided into separate local organizations, which seem to have been determined by the relation of family, kindred or clan, and of local association. Historians affirm that among all the Germanic nations the tie of family had great influence and strength.

The dominant idea of these governmental communities was that of personal responsibility for the good order of society.

(1) *The frank-pledge*.—This was a species of political suretyship, by which the people were, to a certain extent, responsible for the conduct of each other. Every man was constituted politically his “brother’s keeper.” Of frank-pledge there were two classes: first, the personal liability of a superior for his vassals and dependents. Upon every lord rested a responsibility for his tenants and retainers, and every head of a family was required to protect and answer for all its members, including his wife, children and slaves. If a vassal or retainer were accused of a criminal offense, the lord must see the accused person brought before the court. If the accused should abscond, and the penalty of his alleged offense consisted of a fine, it became forfeited by his superior to

the king. And if the superior himself were suspected of conniving at the offense, or at the escape of the offender, he must clear himself by his own oath and that of five other thanes as compurgators.

(2) *The tithing*.—This was the first and most elemental division into which the people were classified for governmental police purposes. It embraced ten families, or householders of freemen, whose duty it was to enforce the frank-pledge within their respective limits. Each man was in pledge or surety, both to his fellows and the state. He was in fact a peace officer, charged with the duty of enforcing peace and good order in the community, preventing as far as possible the commission of crimes, and securing the arrest, conviction and punishment of criminals. The limited number of individuals in each community, their intimate knowledge of each other, and the affairs of all, enabled them to exercise an intelligent and efficient supervision over the wayward, secure obedience to the laws, and furnish mutual protection. At the head of this division was an official named the tithing-man, clothed with police powers. In modern times a tithing-man, under the same or a different name, is an official with the general powers of an under-constable. In some of the states of this country there is a parish officer called "the tithing-man," annually elected by the people, who is charged with the duty, and clothed with the power, of preserving order in church during divine service, and enforcing an orderly observance of the sabbath. Many mischievous New England boys have carried with them through life a vivid and salutary recollection of this official, and the faithful discharge of his duties.

The principle of the frank-pledge, while unknown by

that name, is the same in substance and effect as that prevailing in England and America, which makes it the duty of all persons to aid in the enforcement of the laws; to report to the authorities crimes committed within their knowledge; to aid in the arrest of criminals, and which makes the concealing or compounding of a felony a criminal offense.

(3) *The hundred*.—Next in order to the tithing was the hundred. There is a lack of entire unanimity among writers in regard to the organization of this division; but it is agreed that it constituted a local tribunal, sometimes termed “the hundred gemote,” which held a district court once in each month. This court was sometimes presided over by the ealdorman, and sometimes by the gerefafa of the county. The last-named officer, gerefafa, was an assistant of the ealdorman, representing him in his absence, and taking his place as president of the local courts. Our term “sheriff” is derived from the Saxon *shire-gerefafa*, or *shire-reeve*, which has the same meaning.

(4) *The burgh*.—This division embraced a hundred, or a union of hundreds in a more compact form, surrounded by a moat, a stockade, or a wall. It transacted its own local affairs through the burgh courts

(5) *The shire*.—This division was territorial, having definite boundaries, including within its limits the tithings and hundreds. It embraced also the king’s thanes (*thegnas*) with their vassals, religious houses and corporations, including their tenants and dependents. The chief officer was the ealdorman, and local affairs were administered through the shire courts. This court, sometimes known as the shire-gemote, was regularly held twice in each year, and the higher courts were held three times in each year.

All the courts now mentioned had jurisdiction of matters civil and criminal; and they also took cognizance of such ecclesiastical questions as involved personal and property rights and wrongs.

In the foregoing Anglo-Saxon divisions and courts are easily discernible germs, since developed in English and American governmental and juridical systems.

The supreme court and general council of the nation, known as the Witena-Gemote, possessed very extensive powers and functions. Its name signifies an assembly of the wise, being formed from *wita*, a wise man, and *gemot*, a meeting or assembly. The jurisdiction, duties and functions of this assembly were both legislative and judicial. There was also an ecclesiastical element in its composition, represented in the membership by archbishop, bishops and abbots; and questions concerning the rights and privileges of the church were subject to the judgment of this element. The Witena-Gemote was the only tribunal which had jurisdiction of disputes between the king and his thanes, or between the thanes themselves.

The leading principle of Anglo-Saxon governmental polity was local self-government. The idea found expression and practical application in the Witena-Gemote; it was vital in all the divisions and organizations of the nation, and has continued to live and exert a molding influence upon society, under various names and conditions, through intervening centuries to the present time. It affected to a large extent the institutions of England, but is more marked and fruit-bearing in the United States of America. It is conspicuous in the divisions into towns and counties in New England and New York, each local division, with its own popular assembly, officers and courts, having a large measure of control in local affairs.

§ 117. **Anglo-Saxon jurisprudence.**—History fails to furnish a full and authentic account of early Anglo-Saxon laws. Mention is made of codes of which little is known at present, and which, it seems, did not contain all the laws in force, but consisted of new rules and regulations supplementary to the body of unwritten laws known to the people. Notice is taken of laws published by Ethelbert, king of Kent, at an early date; later successively, the laws of Ina, king of the West Saxons, of Alfred, Edward his son, and Canute. In these successive productions may be seen evidence of progress in civilization and knowledge in state-craft; yet in all were mingled, to a greater or less extent, the prevailing superstitions of the times with moral and religious precepts, contributed presumably by the ecclesiastics who aided in framing the laws.

Of the criminal code there were two general divisions: First, the *bote-loss*, so called, which included treason, deserting the standard of one's lord, open theft or rapine, burglary and murder; for which crimes the penalty was death without remission. The second division embraced all offenses not included in the first division, and for these justice might be satisfied by the payment of a pecuniary penalty.

The uncivilized condition of society at an early period of Anglo-Saxon nationality is emphasized by a method allowed for obtaining satisfaction for a personal grievance; by which method the injured party and his kindred might take personal vengeance against the criminal or trespasser and his kindred.

This method was called the "*feud*," and, when blood had been shed, the relatives of the victim might pursue and take the life of the slayer; or, if he had escaped and taken refuge in his own dwelling, they might declare

hostilities against him, which was termed raising the "fend." If a "ceorl" killed a noble it required the death of six of his relatives as a penalty and reparation. While in Anglo-Saxon government and jurisprudence are found wise and just elements, the sanction of personal vengeance for injuries indicates a comparatively low state of civilization. The practice, now outlawed in Christian nations, when resorted to in violation of law, rarely fails to result in bloody family feuds which sometimes continue from generation to generation. Its prototype may, perhaps, be seen in the ancient Hebrew "avengers of blood," lacking, however, the spirit of justice and humanity which provided cities of refuge for unwitting man-slayers. Under Anglo-Saxon polity, for crimes when committed in the day where certain evidence of guilt was present, summary justice might be inflicted by immediately putting the criminal to death without even the form of a trial. But a delay in this summary visitation, even for one night, would bar the right of such a measure and entitle the accused to a regular trial under due forms of law. Thereupon either of three methods might be pursued: First, a presentment for trial by the hundred, through twelve of the chief citizens, who, with the gerefa, were sworn not to accuse any innocent person or to conceal any crime. In this proceeding may be seen the germ of our grand-jury system. Second, by the presentment of three or four men of the vicinage. And third, by the injured party himself, when the crime did not involve the penalty of death, who was not to act from malice; and his oath must be confirmed by seven compurgators. The charge being made in one of these ways, or, as expressed in modern legal terms, the indictment being found, the next step was to secure the attendance of the accused for trial. This, ordinarily, was effected through the frank-pledge above described, which was essentially a domestic police.

On the appearance of the accused party in court a trial ensued; but in early times not such a trial as the term now signifies. Evidence, in the true sense of that term, facts and probabilities, had no place in the proceedings and no influence in determining the result. The guilt or innocence of the accused was sometimes determined by the ordeal of hot water, hot iron, or the judicial combat; but at an advanced period the verdict was generally based on the oaths of *compurgators*. This method was, in brief, as follows: The defendant was summoned to bring with him his relations or neighbors in numbers according to the degree of the offense or value of the property, varying from six to one hundred, who, with the party himself, should make solemn oath that he did not commit the act with which he was charged. The compurgators generally had no knowledge of facts, but made oath to the innocence of the accused upon the strength of their prejudices, or their confidence in the character and statement of the defendant. The complaint might produce an equal number of compurgators, who, without any knowledge of the facts, would swear to the guilt of the accused.

Later another method for the trial of causes obtained, which was somewhat in advance of the first named. In this method the power and duty of deciding the case was delegated by the court to a limited number of freemen in the district, selected from the vicinity of the locality where the alleged offense occurred. The number of delegated triers was generally twelve or some multiple of twelve. This body did not hear testimony or argument, but the members were supposed to have knowledge of the facts involved from personal observation, and reliable information coming from the *locus in quo*. As they acted on their own personal knowledge, and under oath, they were liable to the penalty for perjury for the rendition

of a false verdict. In this judicial proceeding the germ of the jury system is found in its rudimental state. Without following its development step by step, it is sufficient for present purposes to say that it resulted in English and American jury trials. For the full history of Anglo-Saxon jurisprudence in all its features and progressive development, the reader is referred to the works below named. A careful study of this interesting branch of early history will reveal germinant principles of English and American law, mingled, however, with crudities and anomalies in procedure, viewed in the light of modern civilization.

The general manner in which the subject of this chapter has been treated, making it difficult to furnish references to authorities for each particular statement, induced the author to omit all references in passing, and furnish at the close a list of the works on which the text is based. This, it is believed, is the best service which the writer could render his readers. Appended is the list of such authorities.

List.—Palgrave's "Rise and Progress of England under the Anglo-Saxons" (London, 1832); Lappenberg's "History of England under the Anglo-Saxon Kings" (English translation by B. Thorpe, London, 1845); "Six Old English Chronicles," edited by J. A. Giles (London, 1848); J. M. Kemble's "Saxons in England" (London, 1849); Sharon Turner's "History of the Anglo-Saxons" (7th ed., London, 1852); "The Anglo-Saxon Chronicles," edited with a translation by B. Thorpe (London, 1861); "Anglo-Saxon Laws and Institutes," edited by Benjamin Thorpe (London, 1840); 1 Cooley's Blackstone, pp. 63 *et seq.* and pp. 409 *et seq.*; Pomeroy's Municipal Law, pp. 214–241; and Finlason's Introduction to Reeve's History of English Law, vol. I, chapters I and II.

CHAPTER XVI.

THE FEUDAL SYSTEM.

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§ 118. Significance of the term “feud.”— This term has two meanings or uses, one general and the other technical. The first, as defined by Webster, is “a combination of kindred to avenge injuries or affronts done or offered to any of their blood on the offender and all his race.” “A contention or quarrel; especially an inveter-

ate strife between families, clans, or parties in a state; deadly hatred; contention satisfied only by bloodshed." Feuds of this kind, under the familiar characterization of "family feuds," are not unknown in the United States. The second meaning or use of the term "*feud*," "*fief*," or "*fee*," is technical, a legal term, which signifies in its original application a conditional stipend or reward to the owner of land for its possession and use. The condition annexed to the grant was, that the grantee or tenant should do service faithfully, both at home and in the wars, for the grantor. For the faithful performance of this undertaking the tenant took an oath of fealty; and in case of a breach of the condition and oath, the land would revert to the grantor, the lord.

This system, which was both the outgrowth and exponent of society during its dominance, stamped its impress upon civilization, which intervening ages have not wholly erased. It has had a very appreciable agency in rearing and fashioning the structure of European and American jurisprudence.

§ 119. Origin and main features of the feudal system.—Modern researches seem to have fully established the fact that feudalism had its origin among the barbarian nations that issued from the "wilds and woods of Germany, overthrew the Roman empire and spread over a large portion of Europe. That it existed in England prior to the Norman conquest is quite certain; but it was more fully developed and matured under the Conqueror and his successors. It was in essence and spirit a military system. The nobility were trained to arms, and constituted the rulers and leaders in the state. Manual labor was regarded by them as degrading, and was left to the lowest classes in society. Land, which was owned by the lords, consti-

tuted the only property of consequence in the estimation of the people, or in the eye of the law. Of personal property there was little in amount, and that little was held in slight regard. The principal feature of the system, as it regards landed property, was that the ownership or title rested in one person, *the lord*, while the actual possession and use belonged to another, *the tenant*. This apportioned interest in the soil was the basis of the military relation between the two; of superiority and protection on the one side, and dependence, faith and service on the other.

When the ownership and possession unite in one person, when he has both the right to the soil and the profit, the title and the usufruct, the land is termed "*allodial*." The origin and significance of this word will be seen by reference to the early Saxon rules of ownership and transfer of lands. When they settled upon land and formed themselves into society, a portion of the territory was marked out by definite boundaries for the separate use of a greater or less number of free persons, their families and dependents, as a single, undivided community. The tract thus set apart and marked out was termed the "*mark*;" and the term "*marches*," used on the continent, has the same Teutonic origin and meaning. In settling a wild, uncultivated country, the Saxon in early times did not, in the first instance, subdue a portion of the land for his own individual possession and use; the communistic polity was adopted, and the mark represented the lands held in common. As the community grew by accessions from without, and from natural increase, the boundaries of their possessions were extended. In the course of time, when a sufficient portion of the land had become arable, it was divided into separate lots for the individual use of the settlers, so that each freeman could own and possess one in his own right. The allotment to each was called his

“alod,” in effect his possession. From this word “*alod*” came the term “*allodial*,” which characterizes the ownership of lands in the United States. The feudal tenure, as we have seen, was directly opposite to the allodial system of ownership, being founded upon the idea of ownership in one man, while the occupancy and profitable use was in another.

§ 120. Change from the Saxon polity to the feudal system.—Our prescribed limits will not permit a detailed history of the gradual change from the early Saxon polity to the feudal system. Such a change took place, wrought by influences and agencies which increased to a large extent the possessions of the crown, and greatly augmented the royal power and prerogatives. The doctrine obtained that the original and ultimate title to all the lands in the realm was in the king, and that he could dole them out at his pleasure, and on his own terms. This assumption reached its full development and did its perfect work in England under William the Conqueror. The king granted lands to his favorite nobles, and generally on the condition and oath of fealty and military service. The grantees or beneficiaries of the king held their lands of and under him, and were bound to support him in war; while he in return was under obligation to protect them in their rights and in the enjoyment of their lands. They were in theory his tenants and vassals, owing him allegiance and service for his bounty and protection.

There are some minor questions connected with the feudal system in its early establishment and development, concerning which distinguished authors disagree, and which, in this study, must give place to leading features of the system.

§ 121. **Subinfeudation.**—In the course of time the system became more complex. If the king, as ultimate lord of the soil, could have his tenants and vassals, they in turn, it was thought, could have theirs, and they did. The practice of subinfeudation was introduced. The king's tenants, the great vassals, who held large tracts of land, divided them and sublet portions to others, who thereby became tenants and vassals of the great lords, under the same kind of tenure, substantially, as that by which the latter held from the crown; thus repeating in a lower degree, and on a diminished scale, the relation of lord and tenant, king and vassal. The subtenants again divided and underlet, and the process of division and multiplication went on until there were many ranks of tenants between the king and the lowest feudatory, the rude peasant who actually tilled the soil. As a natural result, the higher natural allegiance of each county or dukedom was transferred in a large measure from the king to the superior lords; and the feudal tie of each vassal to his immediate superior largely supplanted the sentiment of national loyalty. In time the great nobles, growing with the enjoyment and exercise of their feudal power, assumed the character, and exercised the prerogatives, of independent princes, and not infrequently placed themselves in an attitude of bold defiance of the crown. This condition of the social relations naturally resulted in that long and severe struggle between the king and his barons recorded in the history of the times.

§ 122. **Baronial courts.**—An important feature in the feudal system was the right of the lord to administer justice throughout his territory in his own private court. Under the Saxon polity the courts were local and representative; but under the feudal system, these local tri-

bunals were superseded by the territorial courts of the feudal lords. Several agencies combined to produce this change, prominent among which were the increased power and prerogatives of the crown, the doctrine that the sovereign was the original and ultimate lord of the soil, the establishment of the feudal tenure, and the practice of subinfeudation which clothed the nobility with great power. It was one of the duties of the vassal, required by the relation, to render service to his lord in his court. The jurisdiction of these baronial courts was co-extensive with the territory held by the lord, and embraced all matters of difference arising among the vassals and feudal tenants. The lord did not always sit in person as judge in his own courts; and it finally became the uniform custom for a deputy or bailiff of the lord to hold the courts in his name, and to exercise the judicial power. He was required, however, in his deliberations to consult with the lord's vassals or peers of the court who attended its sittings, or at least with the wisest and most prudent of them. The peers of the court, it should be stated, were the possessors of fiefs; and they were required to originate their complaints, or, in modern legal parlance, bring their actions, in these tribunals, with a right of appeal to the king's court in matters of grave importance, and upon a denial of justice in the court below.

It may be noticed in this connection, also, that the vassals who held their fiefs directly from the crown were peers of the king's court, and bound to sue and answer there, and to there render the assistance of their counsel and judgment when required.

§ 123. Inalienability of fief or seignioralty without consent.—As the feudal system existed in its original

purity, the tenant could not alien his fief, nor the lord his seignioralty, without the consent of the other. The reason of this rule is found in the military and personal relations of the parties. If the tenant could substitute another person in his place at his own pleasure, without the assent of his lord, the latter might be brought into intimate and important relations with one of whom he had no knowledge, and in whom he had no confidence. On the other hand, the vassal could not, and should not, be compelled to accept as his lord a person to whom he would never have voluntarily sworn fealty. The principle here involved enters, to a greater or less extent, into many relations under modern juridical systems.

The principal features of the feudal system, as seen originally in its simple military character, have now been outlined. In the course of time, however, there came into existence feuds of a different character; in some of which the service was made certain in amount, manner and time; in others, the payment of a stipulated rent in money or produce was substituted for personal and military assistance; and in others, still, the service consisted in tilling the soil, or performing other menial offices for the superior. Before noticing these changes it will be in order to point out the leading incidents connected with the feudal relation of lord and vassal, and of the military tenure of lands.

§ 124. *Escheats*.—When feuds became heritable, so that they would descend to the heirs of the ancestor upon his death, in some cases there would be no living heir to inherit. In such case the fief would revert to the lord, and he could then lawfully grant it to a new tenant. This return of a fief to the lord was called an *escheat*, a familiar name at the present day. So, also, when the tenant was

guilty of a breach of any of the conditions on which he held the fief, it worked a forfeiture, and the land escheated to his lord. This is regarded as the origin of that rule of the English law by which treason works a forfeiture of the estate of an attainted subject, and also corruption of blood; that is to say, it stops the current of inheritance, so that no heir can trace title through an attainted subject. The founders of the government of the United States, in framing the organic law, rejected this relic of the feudal system, and provided that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted."¹ But the escheat of lands to the state, upon a failure of heirs on the death of the last owner, is retained by the individual states.

§ 125. *Aids*.—Contributions from vassals for the benefit of their lords were denominated aids. Primarily these aids were for three purposes only: for ransoming the lord's person when he was taken prisoner; for defraying the expense of making his lord's eldest son a knight; and for providing a marriage portion for the lord's eldest daughter. But as the lords increased in power and became exacting, and sometimes necessitous by reason of their extravagance, they enlarged and multiplied their demands upon their long-suffering vassals; claiming money from them for the payment of their own debts, and for other purposes, until in many cases these exactions became exceedingly burdensome and oppressive. At first, these contributions, it is supposed, were mostly voluntary; but finally, what had been granted by the vassals as a favor was demanded by the lords as a right, and "on the side of the oppressor there was power."

¹ Const. U. S., art. III, sec. 3.

The evil was remedied by Magna Charta, which abolished all aids except the first three above mentioned, as the only primitive ones; and even prohibited the king from any upon his immediate vassals, except by consent of parliament.

§ 126. **Reliefs.**—To understand reliefs it must be premised that in the beginning of feuds they were generally granted for life only, and, of course, did not descend to the heirs of the vassal upon his death. In order to secure a renewal of the grant to the heir, he was required to pay a sum of money to the lord; in other words, he was compelled to purchase the inheritance. The sums thus paid were called reliefs. They were, indeed, reliefs to the lords, but often burdens to the heirs; for the amount to be paid was at the discretion of the lord, and his necessities or greed often laid upon them crushing burdens. Finally, by a charter of Henry I. and a statute of Henry II., reliefs were fixed at the sum of one hundred shillings for each knight's fee.

§ 127. **Primer seizin.**—This affected only the immediate vassals of the crown. Upon the death of the tenant, if the heir was of full age, the king claimed one year's profits of the fief, in addition to the relief before mentioned. This constituted what was denominated primer seizin. The foundation of this claim was the right of the crown, upon the death of its tenant, to take and hold possession of the land until the heirs should make claim; and unless this claim was made within a year and a day from the death of the tenant, the land became forfeited. In the course of time the profits, or their value, for the first year were substituted for the possession.

§ 128. **Fines upon alienation.**—We have seen that the lord could not alien his seignior, nor the tenant his fief, without the consent of the other.¹ In order to obtain consent of the lord the tenant was generally required to pay a sum of money. These payments upon the transfer of the fiefs were called fines. The restriction of alienation by the tenant, except the immediate tenants of the king, was removed by Magna Charta, and by act of 18 Edward I., known as the statute of *quia emptores*.

§ 129. **Wardship.**—If a tenant died leaving an heir, a son under twenty-one years of age, or a daughter under fourteen, the lord became guardian, and as such had the right to possession of the fief, and to the use and profits of the land until the son attained his majority, or the daughter reached the age of sixteen. And he had also the custody of the infant's person. This right of the lord was based upon the assumption that the son was unable to render military service to his lord till the age of twenty-one, and that the daughter was unfit to marry under the age of fourteen. On reaching the latter age, if the guardianship had already commenced, it was arbitrarily extended two years longer, keeping her in wardship until the age of sixteen. The lord was allowed two years for the difficult task of releasing his hold upon the property of his female ward, which, in that age and under that system, may not have been too long a time, especially where there was a large estate involved. When the male heir attained his majority, he was required to pay a fine of half a year's profits of the fief before he could obtain possession of his lands; and a tenant of the crown must be knighted or pay another fine.

§ 130. **Marriage.**—Under the feudal system the path to marriage was not always easy and thornless. The

¹ *Ante*, § 123.

wishes of the female ward were of small account in the matter. It was the right of the lord to dispose of her in marriage as it might suit his views or interest, provided he offered her a husband not inferior in rank to her own. If she proved so ungrateful or capricious as to refuse the offered blessing, a fine was the consequence, graduated in amount to the estimated value of the proposed match. And if the ward had the presumption to follow her own inclinations, and marry without the consent of her guardian, the fine was doubled. Absurd and unreasonable as this incident of the feudal system may appear in the light of the present day, tried by the genius and necessities of that system it has a different aspect. If the lord did not have control of his ward's marriage, she might marry his implacable enemy, or force upon him as a vassal a man whom he would not have voluntarily chosen, and in whom he had no confidence. It may not be doubted, however, that the legitimate power of the lord over the marriage of his female ward was sometimes used by him as a means of oppression and extortion. Sometimes he placed her affections and happiness in one scale of the balance, and his own selfish interests and will in the other, when the former was quite sure to kick the beam. In the process of time, and the advance of civilization, various changes and modifications in the system occurred, which it is not necessary in this outline view, or practicable in our limited space, to point out. But, while the law of feuds did not long preserve all its features in their original distinctness, the relation of lord and tenant became a permanent feature in the English law of landed property. The sovereign is the original source of title to all lands in the kingdom; and all lands not in the immediate use and occupancy of the crown are held of the sovereign, either directly without an intermediary, or indirectly through a

superior lord. It will be seen, therefore, that the proper name for land in England is *tenement*, that is, something held of another. The superior is called the *lord* or *landlord*; the person having the useful ownership and possession is called the *tenant*; and the basis or condition of such ownership is called the *tenure*. It must not be understood, however, that the feudal system of land tenures, with all its original features, exists in England at the present time. On the contrary, while it there prevails, it is in a modified form and effect.

In the United States, with a few exceptions, the lands are allodial,¹ to which the term "tenure" does not properly apply in its original feudal sense, as the title and usufruct unite in the ownership. But the change of the feudal system in England, to the allodial in the United States, did not obliterate all traces of the former. Says Chancellor Kent:² "This idea of tenure prevails to a considerable degree in this country. The title to land is essentially allodial, and every tenant in fee-simple has an absolute and perfect title; yet, in technical language, his estate is called an estate in fee-simple, and the tenure free and common socage. I presume this technical language is very generally interwoven with the municipal jurisprudence of the several states, even though not a vestige of feudal tenure may remain.

§ 131. Different classes of tenures.— Out of the feudal system grew two general classes of tenures, which were characterized by the nature of the service due from the tenant, termed the free and the base. The free tenure could be held and enjoyed by all persons in the condition of freedom; while the base, whose services were of a menial character, were held by the classes known as serfs

¹*Ante*, § 119.

²3 Kent's Com. (5th ed.), p. 448.

and villeins. As examples of the free tenure service may be mentioned military attendance, and other acts of a personal character, which, under the sentiment of the times, were considered honorable. A further separation of these divisions was made into classes; those whose services were certain in amount and time, and those whose services were uncertain in these particulars; the line between certainty and uncertainty marking the division.

Out of the divisions and classes now mentioned grew several kinds of English tenures, which will now be noticed in brief.

1. *The feudal tenure pure and simple*, where the services were free and honorable, but uncertain, and which in time were commuted into escuages of uncertain time and amount.

2. *Free socage*. The distinguishing feature of this tenure is, that its services are fixed and certain, but not military; as, for example, the payment of an annual fixed rent in money, or products of the soil. It is deemed probable that this species of tenure is a remnant of the Saxon institutions which survived the rigorous application of the feudal polity by the Normans. It is by this tenure that most of the lands in England are held. Military tenures were abolished by act of parliament in the reign of Charles II., and the tenure by free socage substituted. Writers differ in respect to the origin of the term *socage*. Sir William Blackstone derives it from the Saxon root *soc*, meaning free.¹ But it is now generally referred to the Latin word *socca* or *soccus*, a plough; and for the reason that this class of tenants were tillers of the soil. It is, however, of no practical importance to determine which is the correct etymology.

¹ 2 Bl. Com. 80.

To prevent confusion in the study of feudal tenures, it should be noted that this kind had, originally, some of the same features which characterized the strictly military tenure. The tenants were required to take the oath of fealty to their lord, and were subject to aids, reliefs, primer seizin, fines and escheats; but the rights and privileges of wardship and marriage did not belong to the lord.

3. *Villeinage*. In this species of tenure, the services required of the tenant were menial in character, and regarded as base, using this term in its *social* and not in its *moral* signification. This tenure was divided into pure villeinage, in which the tenant was bound to do whatever his lord might demand, the service being both uncertain and base; and villein socage, in which the tenant was required to do only a certain and definite amount of service for his lord.

§ 132. **Life under the feudal system.**— Guizot, in his “History of Civilization in Europe,” furnishes a picture of actual life in England under the feudal system. He says:¹ “We will visit the possessor of a fief in his lonely domain, we will see the course of life which he leads there, and the little society by which he is surrounded. Having fixed upon an elevated solitary spot, strong by nature, and which he takes care to render secure, the lordly proprietor of the domain builds his castle. Here he settles himself, with his wife and children, and perhaps some few freemen, who, not having obtained fiefs, not having themselves become proprietors, have attached themselves to his fortunes, and continued to live with him, and form a part of his household. These are the inhabitants of the interior of the castle. At the foot of the

¹ Pages 87, 88.

hill on which the castle stands, we find huddled together a little population of peasants, of serfs, who cultivate the lands of the possessor of the fief. In the midst of this group of cottages, religion soon planted a church and a priest. A priest, in those early days of feudalism, was generally chaplain of the lord and curate of the village, two offices which by and by became separated, and the village had its pastor dwelling by the side of his church."

This picture, if taken at an advanced stage of feudal society, might be greatly enlarged with truthful effect. The central figure would be the imposing castle of the great baron, a prince in power and state, the proud lord of a vast domain, his household of noble retainers and knightly vassals, and his court a reflex of royalty. Surrounding him on his broad estates should be dotted not one village merely, but many. There might be sketched in the same view, inferior lords with their vassals in military array marching to the standard of their chief, who is girding himself for war. Among the mansions of inferior lords might be placed the humble dwellings of tenants, excused from the performance of military service on the payment of an annual rent. Then, to render the picture a faithful presentation of actual life, it would be necessary to sketch the serfs engaged in their menial labor, and also a few boroughs held from some baron and occupied by communities composed mostly of small traders.

§ 133. Impress of feudalism upon English and American jurisprudence.— Before taking leave of the feudal system, it may be useful to indicate briefly, by recapitulation, some of the particulars in which its influence has affected English and American jurisprudence. In so doing it will be assumed that the reader will recall what has

preceded bearing upon the subject, rendering specific references unnecessary.

Under the feudal system, real estate was greatly superior in importance to personal property, both in public estimation and in its influence upon social relations. This distinction, in its permanent influence, affected English and American jurisprudence in several important particulars.

1. *The difference in ownership between real and personal property.*—Feudal law made a distinction between the *title* and the *usufruct* in the ownership of land, and introduced tenures which still exist in England. But feudalism did not apply this distinction to personal property. In this species of property the ownership and the use, the legal and equitable title, might exist in the same person and at the same time.

A change in the relative importance and value of the two species of property began with the rise and power of free cities in the middle ages, and from this beginning personal property has grown with the growth of commerce, trade and manufactures, until it has attained an importance equal, if not superior, to landed property. The difference between the two species of property now mentioned contributed largely to create two sets of rules, the one applicable to real, and the other to personal, property. And in this respect English and American law differ considerably from the Roman system.

2. *In respect to sale and alienation.*—Under the feudal system, neither the lord nor the tenant could alienate without the consent of the other. But this impediment to alienation did not exist in the case of personal property; the absolute ownership and dominion being in one individual at one and the same time, it could be sold and transferred at the pleasure of the owner.

The law in relation to the alienation of lands was modified in England at a later period of her history, and never existed in the United States to any considerable extent.

3. *Inheritance and succession.*—The distinction between real and personal property made by the feudal law necessarily affected the rules of descent and inheritance. Under that system, land only was inherited by the heir; he took no right to, or property in, the goods and chattels. It will be remembered that under the Roman polity the distinction of the feudal system between real and personal property in respect to ownership, alienation, and succession, did not exist; both kinds of property in these respects were impressed with the same character. Under the Roman system, in default of a natural heir, a man could create a legal heir by appointment; and in case of his failure to do so, the law would determine the succession.

So it has come to pass that in England and America, where both the feudal and the Roman law have left their impress, there are two sets of rules governing succession; land falling under the feudal, and personal property under the Roman, polity. In case of intestacy the real estate descends to the heir in accordance with the feudal system, and personal property to the next of kin, or to the administrator for the benefit of the next of kin after payment of debts and costs of administration.

Other traces of the feudal system are found in the municipal law of England and America, less marked and of less importance than those above named, which must give place to other matters.

§ 134. *Chivalry.*—Intimately connected with feudalism is the fascinating subject of chivalry, of which a brief notice will close the present chapter. It must not be as-

sumed that because this institution arose while feudalism dominated Europe it was a necessary part or a natural product of that system. It seems rather to have sprung into existence as a protest and an antagonistic force against the excesses and gross abuse of the feudal power. It originated with a few noble barons, who, moved by sympathy for the oppressed and a love of justice, combined under the solemnity of religious sanctions for the purpose of protecting the weak, relieving the oppressed, and vindicating justice and the right. It may be admitted that the institution, viewed in the light of the present day, had grotesque features, and involved some errors, yet the truth remains that it contained the seeds of noble and generous principle which produced some good fruit. From various causes combined the spirit of the institution spread rapidly until it pervaded all classes of society. In the introduction to Froissart's *Chronicles* it is said: "The baron forsook his castle and the peasant his hut to maintain the honor of a family, or preserve the sacredness of a vow; it was this sentiment which made the poor self-patient in his toils and serene in his sorrows; it enabled his master to brave all physical evils and enjoy a sort of spiritual romance; it bound the peasant to his master and the master to his king; and it was the principle of chivalry, above all others, that was needed to counteract the miseries of an infant state of civilization."

The spirit of the institution may be seen in the first vow of the aspirant to the honors of chivalry, which was: "To speak the truth, to succor the helpless and oppressed, and never to turn back from an enemy."

In speaking of the influence of chivalry upon women, Hallam, in his *Middle Ages*, says: "The love of God and the ladies was enjoined as a single duty. He who was faithful and true to his mistress was held sure of salva-

tion in the theology of the castles, though not of cloisters."

Much more authority in the same line might be given to show the powerful, and for the most part wholesome, influence of chivalry upon the condition of society in the age in which it flourished; but enough has been said on the subject, it is believed, to indicate a rich and fascinating field for thorough study.

Authorities.— The reader is referred to the following authorities on the subject of this chapter: Pomeroy's Municipal Law, pp. 242–252, 263, 253–254, 258, 261–264, 170, 280, 290–292, 278, 260–265; 1 Cooley's Bl. (2 Bl.), ch. IV., pp. 43 *et seq.*, 53–56, 87; 3 Kent's Com., pp. 4, 6, 487–489, 495, 501–509; Finlason's Introduction to Reeve's History of the English Law, vol. I; Bell's Historical Studies of Feudalism; Hallam's Middle Ages, c. 2, ft. 2; Robertson's Charles V.; Guizot's History of Civilization in France; Stubb's Const. Hist. of England; Co. Litt. I, S. 65, a; Wright on Tenures, 137, 138; Sir Henry Spelman on Feuds and Tenures by Knight Service, c. 2; Guizot's History of Civilization in Europe; James' Chivalry and the Crusades; Froissart's Chronicles — Introduction.

CHAPTER XVII.

PLEADING.

- SECTION 135. Civil pleading.
136. Criminal pleading.
137. Equity pleading.

§ 135. **Civil pleading.**—The term “pleading” often conveys to the lay mind the idea of forensic discussion. This is a misconception. When applied to legal proceedings the term implies something decidedly more prosaic. Correctly defined, the pleadings in an action at law, or a suit in equity, are the “statements, in a logical and legal form, of the facts which constitute the cause of action or ground of defense.”¹

Assuming that the several parties to the action are actually or constructively before the court, the next regular step in the proceedings is to inform the court why they are there; in other words, to spread upon the records of the court the allegations of the respective parties, disclosing the particular nature of their controversy.

The plaintiff, in accordance with the rules of court, presents his allegations of fact constituting his ground of complaint or cause of action, and his prayer or demand for relief. Thereupon the defendant makes one of three answers: First, submits a *demurrer*, which, in legal effect, admits the truth of the plaintiff’s allegations, but denies their illegal or actionable character; second, denies the truth of the plaintiff’s allegations; or, third, alleges other facts in justification, avoidance or offset.

¹ And. Law Dic., title Pleading; Gould’s Pl., ch. I, secs. 1-3.

If the pleadings extend no further — as they may under some systems of pleading — the issue is now formed and the record completed.

In practice the pleadings of the respective parties are generally made and served, or filed, by their attorneys prior to the day of trial.

The record thus formed under skilful pleading informs the court of the precise questions involved in the controversy, and furnishes a guide and limitation for the exhibition of evidence and application of law.

The importance of a well-defined and logical issue in juridical administration cannot easily be overestimated. It determines the character of evidence admissible on the trial, limits discussion, prevents confusion, and leaves a record which will thereafter protect all parties concerned in their rights, and against renewed and vexatious litigation of the same questions.

Common-law pleading.—The system of civil pleading at common law, in its essential principles and requisites, was scientific, logical, and, to a thoroughbred lawyer, reasonably simple. Understood and properly utilized, it reduced a legal controversy, however complicated, to a well-defined issue, clearly presenting one or more distinct questions for judicial investigation and decision. But it was never a favorite system with incompetent lawyers. Under it professional success required a thorough knowledge of law, with the power of logical discrimination, without which the pleader was quite liable to wreck his client's case, and his own professional reputation, upon the rock Pleading.

Declaration.—The first step to an issue in pleading is what is variously denominated the *declaration*, *count*, or *complaint*. By whatever name called, it consists of a

statement, in a formal and orderly manner, of the *facts* constituting the plaintiff's cause of action or ground of complaint.¹ As a general rule, only *facts* should be stated, and these as they really exist, or are, "by legal fiction or presumption, deemed to exist."

It is not only unnecessary, but inartificial pleading, to allege matters of law, the judges being presumed to understand it, and whether or not the facts alleged constitute a legal cause of action. Judge Gould well says:² "But in the theory or *science* of pleading the averment of facts on either side always presupposes some principle or rule of *law* applicable to the facts alleged, and which, when taken in connection with those facts, is claimed by the party pleading them to operate in his favor. For all rights of action and all special defenses result from matter of fact and matter of law combined. And hence, in every declaration, and in all special pleading, some *legal* proposition (i. e., some proposition consisting of matter of *law*), though not in general *expressed* in terms by the pleader (because the court is supposed judicially to know it), is always, and necessarily, *implied*, or, to use the language of grammarians, understood."

Good pleading requires that, as a general rule, all *material* facts should be stated in *positive* and *direct* terms, both for the sake of precision, and in order to enable the adverse party to answer the matter alleged directly and distinctly.³ And all good pleading requires that the facts stated should be sufficient in law to avail the party pleading them, and that they be alleged according to established forms of law.⁴ And all new matter offered on either

¹ Bl. Com. 298; Co. Litt. 303, b; Gould's Pl., ch. I, secs. 3, 4.

² Gould's Pl., ch. I, sec. 4. See also Lawes' Pl. 63; 8 Co. 155; Gould's Pl., ch. III, secs. 11, 12.

³ Co. Litt. 303, a; Gould's Pl., ch. III, secs. 23, 42.

⁴ Gould's Pl., ch. III, sec. 1; Cowp. 683; Hob. 164; Bac. Abr., Pleas, etc., Int.

side must contain every *substantive fact* which is essential in *law* to maintain his action or defense.¹

Impar lance.— Before answering or pleading to the plaintiff's declaration, there are certain preliminary moves open to the defendant, namely: a prayer for an *impar lance* signifying an allowance to the defendant of time to talk with the plaintiff with a view to an amicable adjustment of their controversy; and, if the action be founded on a deed, pleaded with a *profert incuriâ* (meaning that the plaintiff brings the deed into court), the defendant is entitled on demand to *oyer* of the instrument, that is, that he may hear it read, or, as now understood and practiced, that he may have a copy of it for examination; and to this he is entitled before pleading to the merits.

Our allotted space will not permit a discussion in detail of these preliminaries; but the reader will find a full explanation in the authorities hereunder cited.²

Preliminaries disposed of, the next step in the proceedings is the defendant's plea or answer. If the defendant fails to plead in the time allowed by law, judgment by default will go against him, granting the relief demanded in the declaration. Neglect to answer is deemed and treated as an admission of the truth of the allegations contained in the declaration, and an assent to the plaintiff's right to the relief or judgment demanded.³

Pleas or answers.— Of pleas or answers there are two general kinds, viz.: *dilatory* pleas and pleas to the *action* or *merits*. Dilatory pleas, as the phrase signifies, are

¹ Bac. Abr. Pleas, etc., A.; Com. Dig., Pleader, C. 76; Lawes' Pl., 46; Gould's Pl., ch. III, sec. 2.

² Gould's Pl., ch. II, secs. 16-21; Com. Dig., Pleader, D. I.; 1 Tidd, 417, 418; 3 Bl. Com. 301; 2 Chit. Pl. 407, 408; Lawes' Pl. 94.

³ 3 Bl. Com. 293; Bac. Abr., Pleas, etc., B. I; Gould's Pl., ch. I, sec. 5.

such as tend to delay the suit, or the plaintiff's eventual remedy.¹ By pleading to the action, the defendant waives all dilatory pleas "except those the matter of which has afterwards accrued."² If no dilatory plea has been interposed, or if any or all allowable by law have been offered and overruled as insufficient, the defendant may plead to the action or merits. If new matter is pleaded by the defendant, it must conform to the rules already stated for the substance and form of the plaintiff's declaration. To the new matter the plaintiff is at liberty to make answer, which is termed the *replication*. The position of the parties in respect of new matter pleaded; the defendant is virtually plaintiff, and the plaintiff is the defendant. And in regard to the qualities of the respective pleadings in the new relation, the same rules govern, *mutatis mutandis*, which apply to the declaration and plea. Thus on in the allegation of new matter, and response thereto by the adverse party, until an ultimate issue is reached. Under the system of special pleading, in its palmyest days, the paper charges and countercharges of the litigants proceeded to the utmost limits ever reached, embracing the *declaration*, the *plea*, the *rejoinder*, the *surrejoinder*, the *rebutter*, and the *surrebutter*.

Pleas to the action or merits consist mainly of two kinds: First, the *general issue*, which is a denial of all the material allegations of the declaration; and second, a *special plea* in bar, which alleges new matter in defense, or in bar of the action. This plea is sometimes confounded with what is known as a *special issue*, which does not allege new matter, but denies some particular allegation of

¹ Gould's Pl., ch. II, secs. 22, 33-35; 3 Bl. Com. 301-303; Bac. Abr., Pleas, etc., E.; Co. Litt. 128, a, 129, b.

² Co. Litt. 303, a; Bac. Abr., Pleas, etc., 2; 1 Tidd, 572.

the declaration essential to the plaintiff's case, and thus in effect denies the entire right of action.¹

There is also a plea in *estoppel*, which neither admits nor denies the plaintiff's allegations, but sets up some new matter inconsistent with his allegations, and precludes him from availing himself of them in the action.²

The plea *darrein continuance* — since the last continuance. This plea is exceptional, but in some cases essential to the ends of justice. It is allowed where new matter of defense arises after issue joined, and the last continuance or adjournment of the cause prior to the trial. It would be manifestly unjust to deprive a party of a good defense which could not have been pleaded at an earlier stage of the proceedings in the action. Pleas of this kind may be either in *abatement* or in *bar*.³

The leading features and principles of the system of common-law pleading have now been outlined. Exceptions, minor rules and illustrations have been omitted for lack of space; but the authorities cited will furnish the reader with guides to a full study of the subject in detail.

In process of time, in consequence of new conditions in business, changes in public affairs and social relations, the subtleties of the bar and conflicts of the bench, the original simplicity, directness and efficiency of the system became seriously impaired. The result was a popular demand for change and reform, to which parliament responded in what is known as "The Common Law Procedure Act," of 1852, and the "Supreme Court Judicature

¹ 3 Bl. Com. 305; Bac. Abr., Pleas, etc., G. I. 3; Com. Dig., Pleader, R. I. 2; Lawes' Pl. 110, 112; Gould's Pl., ch. II, secs. 38-42.

² 3 Bl. Com. 318; Wiles, 13; 3 East, 346, 365; Gould's Pl., ch. II, sec. 42, par. 3.

³ Lawes' Pl. 173; Bac. Abr., Pleas, etc., 2; 1 Chitt. Pl. 625, 637; 3 Bl. Com. 316, 317; Com. Dig., Abatement, I, 24; Gould's Pl., ch. VI, part II, secs. 122-126.

Act," of 1873, by which the original common-law system of practice and pleading was greatly changed and simplified.

In the United States, at present, the English common-law system of pleading, in its original integrity, prevails in but few, if any, of the states. Each state has its own system; and quite generally the old system inherited from the mother country by the original thirteen has been changed to a greater or less extent and simplified. Codes of practice, procedure and pleading have become the order of the day; and it may reasonably be questioned whether, in seeking to avoid the evils of the old system, codifiers have not sometimes gone to an opposite extreme. The zeal of some modern reformers, while abundantly ardent, is not always "according to knowledge;" they seem to forget that "*change is not reform.*" Whatever evils are justly chargeable to special pleading in its worst estate, it cannot truthfully be denied that its conception and underlying principles were wise and salutary. As we have seen, its purpose was to reduce the controversy between the parties to a single, definite, logical point or issue, eliminating all extraneous and inconsequential matter, and leaving only a single question for the court, or the court and jury. The opposite extreme would incumber the record with a mass of verbiage, relevant and irrelevant, furnishing no definite limits for the exhibition of testimony, and presenting to the court and jury a general assortment of confused and confusing allegations, which, on the trial, might lead to a threadless labyrinth of perplexities. Or, on the other hand, the pleadings might be so general, indefinite and inartificial as to leave for the trial a noisy and unseemly wrangle, with guesswork as the outcome. Sometimes, at the close of the evidence and rendition of the verdict, the

prevailing party is permitted to amend his pleading, making it conform to the evidence, which is equivalent to beginning the trial with the evidence and closing with the pleadings.

It is not meant to be affirmed that all the modern codes and systems of pleading are open to the criticisms above implied; on the contrary, there are wise codes and systems of pleading in the United States. The science, logic, and underlying principles of common-law pleading may wisely be observed in all systems, avoiding extremes.

§ 136. Criminal pleading.—Pleading is a division of the general subject of Procedure, and is often treated in connection with it; but here it will be considered by itself.

The most notable feature which distinguishes criminal from civil procedure is, that in the latter a person or subject is the plaintiff, while in the former the government is the plaintiff or prosecuting party. In case of a wrong or injury to an individual by another person, the injured individual is the primary and principal party to complain and prosecute; but crimes are primarily wrongs against the government, which represents the whole body politic, and is, consequently, the proper party to prosecute the offender. There are, however, wrongs which are both public and private in their character and effect, and may be prosecuted both by the government and the injured individual; the former in a criminal proceeding for the purpose of inflicting punishment, vindicating justice, and maintaining its own authority; the latter in a civil suit for the recovery of damages for the personal injury sustained.

It may be noticed in passing, that, when the govern-

ment prosecutes, it does so in a name indicative of its kind or form, as whether monarchic or popular. For examples, in England it is the King (*rex*), or Queen (*regina*); in the United States it is, variously, the people, state, or commonwealth, each state adopting its own form, but all indicative of popular government. When the general government prosecutes it is in the name of the United States.

Methods of charging offenses.—The formal methods of charging offenses in criminal proceedings are: 1, by indictment; 2, by presentment; 3, by information; and 4, by complaint before a magistrate.

1. *An indictment.*—This is defined by Blackstone to be “A written accusation of one or more persons of a crime or misdemeanor, preferred by, and presented upon oath by, a grand jury.”¹ This is the method generally employed in England and America in prosecuting the higher grades of criminal offenses.

2. *Presentment.*—The difference between an indictment and a presentment consists mainly in the method of procuring the finding of the grand jury, and is not of sufficient importance to occupy time and space in this general study.²

3. *Information.*—The only substantial difference between an information and an indictment is, that the former is “presented by a competent public officer, on his oath of office, instead of a grand jury on their oath.”³ The criminal information is, in general, employed only in

¹ 4 Bl. Com. 302; and see 1 Bish. New Crim. Proc., § 131.

² 1 Bish. New Crim. Proc., § 136, and cases there cited.

³ 1 Bish. New Crim. Proc., §§ 141–147, 712–715; Bac. Abr., “Information;” 2 Hawk. P. C., c. 26, § 4; Wilkes v. Rex, 4 Bro. P. C. 360.

minor offenses, crimes of a higher grade being prosecuted on the presentment of a grand jury. But in the United States there is a lack of uniformity in this regard.

It should be noticed in this connection that the constitution of the United States provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on the presentment of a grand jury, except in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger."¹ An "infamous crime," within the purview of this provision, is one that is punishable in a state prison or penitentiary, either with or without hard labor.² And it has been authoritatively adjudged that this provision does not bind the states; and, moreover, that offenses against the United States which are not within this constitutional inhibition may be prosecuted by information.³

4. *Complaint before a magistrate.*—Justices of the peace and other magistrates of inferior rank have more or less judicial power, and are charged with the trial of minor offenses. But in these cases complaints are made before the magistrate in writing, or orally, and reduced to writing by him or under his direction; which, though less formal and technical than indictments and informations, perform substantially the same office.⁴

Requisites of good indictment.—It is an invaluable fundamental maxim among civilized and christian nations, that no subject of the government shall be punished for

¹ Const. U. S. (Amendments), art. V.

² U. S. v. De Wait, 128 U. S. 393; Mackin v. U. S., 117 U. S. 348; Ex parte Wilson, 114 U. S. 417; Butler v. Wentworth, 84 Me. 25.

³ U. S. v. Waller, 1 Saw. 701; State v. Cowen, 29 Mo. 330; Bank of Vincennes v. State, 1 Blackf. 267; State v. Benson, 38 Ind. 60.

⁴ 1 Bish. New Crim. Proc., §§ 148, 149, 174.

a crime with which he has not been legally and duly charged, and had a reasonable opportunity of making his defense. Obviously, therefore, a good indictment or other formal accusation is an indispensable requisite for valid criminal prosecutions in courts of law. And it is equally obvious that the indictment should definitely and clearly state all the facts and circumstances constituting the crime charged, and show the jurisdiction of the court of both the alleged crime and the prisoner. Says Bishop:¹ "The indictment must disclose on its face that it was found by competent authority, in accordance with the law; and that one therein did, within the jurisdiction of the indictors, such and such acts, at a time stated; which acts, so done, constitute what the court can see, as of law, to be a crime justifying the punishment to be inflicted." He further says² that "every wrongful fact, with each peculiar modification thereof, which, in law, is required to be taken into the account in determining the punishment upon a finding of guilty, must be alleged in the indictment."³

The same requisites of a good indictment now stated in a general way, apply, in substance, to all the methods of accusation in criminal prosecutions above mentioned.

Pleas.—As a preliminary step in defense before pleading to the merits, the defendant may move the court to quash the indictment. This motion is generally for some defect apparent upon the face of the indictment; but in exceptional cases, where the defect is not apparent upon view, some courts permit the defect to be shown by ex-

¹ 1 Bish. New Crim. Proc., § 135.

² *Id.*, § 77.

³ *Id.*, § 98a, and cases there cited. And see *Com. v. Hayden*, 150 Mass. 332-334; *Hobbs v. State*, 44 Tex. 353, 354; *State v. Startup*, 10 Vroom, 423, 432; *State v. Clay*, 100 Mo. 571, 583.

trinsic evidence; but respecting this there seems to be no established uniform practice. Mr. Bishop says that the general doctrine of quashing "is, that whenever an indictment cannot be proceeded with advantageously to public justice, or without doing a wrong to the defendant, the judge may in his discretion quash it; in other words, cause it to abate."¹

But as the practice on this motion is not uniform among the states, its discussion here in detail is not practicable nor important.

If the motion to quash be granted, the prosecution on that indictment is ended; if denied, the next regular step in the proceeding is defendant's plea to the indictment.

In *criminal* as in *civil* procedure, there are dilatory pleas, and pleas to the merits. The different kinds of pleas, as enumerated by Starkie, and indorsed by Bishop, are the following: "I. A plea to the jurisdiction. II. A declinatory plea. III. A plea in abatement of the indictment for some defect contained in it. IV. A demurrer. V. A plea in bar. VI. The general plea that he is not guilty."²

In these general divisions, with their subdivisions and authorities cited, the student and lawyer will find abundant information on the subject of criminal pleading for all practical purposes.

§ 137. Equity pleading.—An exhaustive discussion of equity pleading would require a study of the English high court of chancery, its progressive development and modifications. Such a discussion is not within the purpose and scope of this work. A reliable account of this

¹ 1 Bish. New Crim. Proc., §§ 758–760; Reg. v. Wilson, 6 Q. B. 620; Rex v. Tremearue, 5 B. & C. 761.

² 1 Stark. Crim. Pl. (2d ed.) 310–320; 1 Bish. New Crim. Proc., §§ 734–743.

court, its origin and early history is given by Blackstone, to which the reader is referred.¹

To prevent misunderstanding and confusion, it should be noted that, at the present time, courts of *chancery* and courts of *equity* are practically the same in jurisdiction and procedure, and these designations are used interchangeably.

Bills of complaint.—The pleadings in an equity or chancery suit are initiated by a bill in the nature of a petition or complaint, setting forth in legal form the complainant's grievances, and praying the relief to which he thinks himself entitled; it corresponds in place and office to the plaintiff's declaration in an action at law.

Of bills there are two kinds: bills praying relief and bills of discovery. The latter kind were formerly much in use, and mainly for the discovery of information possessed only by the party interrogated; but since parties to an action or suit may quite generally be examined as witnesses on either side, and under the wide prevalence of code legislation essentially changing the procedure, both at law and in equity, this class of actions is rarely utilized.

The present discussion will be confined to bills for relief, which formerly consisted of nine parts, as follows: "1. The address to the person or persons holding the great seal. 2. The names and addresses of the persons complainant. 3. The statement of the plaintiff's case, commonly called the *stating part*. 4. The charge that the defendant unlawfully confederated with others to deprive the plaintiff of his right. 5. The allegation that the defendants intend to set up a particular sort of defense, a reply to which the plaintiff anticipates by alleging certain

¹ 3 BL. Com., p. 47; 2 Cooley's Bl., p. 45 *et seq.*

facts which will defeat such defense. This was usually termed the *charging part*, from the circumstance that the plaintiff's allegations were usually introduced by way of charge, instead of statement. 6. The statement that the plaintiff has no remedy without the assistance of a court of equity; which was termed the *averment of jurisdiction*. 7. The interrogating part, in which the stating and charging parts were converted into interrogatories, for the purpose of eliciting from the defendant a circumstantial discovery, upon oath, of the truth or falsehood of the matters stated and charged. 8. The prayer *for relief*, adapted to the circumstances of the case. 9. The *prayer* that *process* might issue, requiring the defendant to appear and answer the bill; to which sometimes was added a prayer for a provisional writ, such as an injunction or *ne exeat regno*, for the purpose of restraining some proceedings on the part of the defendant, or preventing his going out of the jurisdiction till he had answered the bill.”¹

Both prior, and subsequent, to the period when the foregoing elaborate form prevailed, the bill was much simplified in its structure. It is here introduced, both on account of its historic interest and its value as a method of eliciting truth and administering justice and equity.

For convenience of discussion, and all useful purposes in practice, the bill may be, and quite generally is, reduced from *nine* to *four* parts, namely: 1. The address of the bill; 2. The name and address of the plaintiff; 3. The stating part; and 4. The prayer for relief.

1. *The address of the bill.*—The bill being in the nature of a petition or complaint, obviously it should be addressed

¹ Heard's Eq. Pl., p. 19; and see Mitf. Pl. (5th ed.) 49; 1 Barb. Ch. Pr. (2d ed.), B. I, ch. I.

to a court authorized to hear it, and competent to grant the relief demanded. No authorities are requisite to show that the selection of the proper court by the plaintiff is vital; and it is equally obvious that the court selected should be correctly designated in the bill.

2. *The names and addresses of the plaintiffs.*— Under this head, Mr. Heard, in his compend of equity pleading, says: "It is not only necessary that the names of the several plaintiffs in a bill should be correctly stated, but the description and place of residence of each plaintiff must be set out, in order that the court and the defendants may know where and to whom to resort to compel obedience to any order or process of the court, and particularly for the payment of any costs which may be awarded against the plaintiffs, or to punish any improper conduct in the course of the suit, as well as to furnish distinct means of decision, in all future controversies, in regard to the subject-matter and the identity of parties."¹

The names, descriptions, and places of residence of the defendants should also appear in the bill. This requirement may assume special importance in the courts of the United States, where the jurisdiction of the residence court often depends on the residence of the plaintiffs and defendants being in different states, independent of the subject-matter of the bill.²

3. *The stating part.*— The bill must clearly and distinctly show on its face, by the statement of facts, that the plaintiff is entitled to the relief demanded or some

¹ Heard's Princ. Eq. Pl., p. 20; and see 2 Mitf. Pl. (5th ed.) 49; 1 Story, Eq. Jur., § 26; Simpson v. Burton, 1 Beav. 558; Rowley v. Eccles, 1 Sim. & St. 511; Jackson v. Ashton, 8 Peters, 148.

² Jackson v. Ashton, 8 Peters, 148; Heard's Princ. Eq. Pl., p. 21.

part of it, and that the court has jurisdiction in the premises, and authority to grant it.¹

4. *The prayer for relief.*— It is enough for present purposes to state in a general way that the prayer for relief should correspond with the stating part of the bill, and clearly and distinctly show the particular relief which the complainant demands; and when two or more kinds are demanded the prayer should clearly discriminate between them.

Defensive pleading.— To a bill in equity a defendant may respond in three modes, namely: by demurrer, by plea, and by answer.

Demurrer.— The office of a demurrer is sufficiently explained in this chapter under the division of civil pleading. A defendant may demur to the whole or a part of the bill, plead to a part, and answer to the residue.²

Pleas.— A plea is defined thus: “The statement, in a logical and legal form, of the facts which constitute the cause of action or the ground of defense.”³ “A plea in equity is, in effect, an introduction by the defendant of fresh facts into the case made out by the plaintiff, sufficient, if proved, to make the action demurrable.”⁴ In equity, as at law, there are dilatory pleas, which are such as tend to delay the suit, and the plaintiff’s ultimate recovery; and pleas to the suit or merits, which confess or deny the merits of the complaint and the plaintiff’s right

¹ 1 Barb. Ch. Prac. (2d ed.), p. 38 *et seq.*; Heard Princ. Eq. Pl., p. 23 *et seq.*

² 1 Barb. Ch. Pr. (2d ed.), p. 105, n. 8; Heard’s Princ. Eq. Pl., p. 53 *et seq.*

³ Read v. Brookman, 3 T. R. 159; 2 Cooley’s Bl., p. 293, and note (1).

⁴ Heard’s Princ. Eq. Pl., p. 84 *et seq.*

of recovery. A general division of pleas is, pleas in abatement and pleas in bar; the several kinds of which are pointed out in treatises on pleading.

Answers.—The third and most common method of defensive pleading is by answer. Says Mr. Heard:¹ “The function of an answer is twofold: to give discovery by specific answers to all questions put by the interrogatories filed in aid of the bill; and to aver all such original matter as the defendant may have to put forward for making a case, which, if true, destroys the equity of the plaintiff’s case, even though all or some of the plaintiff’s allegations may be true.”

Where the distinctive procedure prevails in this country it is generally governed by the rules of the English high court of chancery; always, indeed, except where those rules have been changed by statute or the rules of the local courts.²

The foregoing summary presents the leading features and principles of equity pleading, as distinguished from civil and criminal pleading. It is based upon the English chancery system, from which our equity procedure was originally derived. In modern times important changes have been made in law and equity procedure, which have to a greater or less extent affected the rules of pleading in the jurisdictions where the changes have taken place, mainly in simplifying the forms and structure and eliminating useless matter; but in some cases, if not in all, where changes and emendations have been

¹ Heard’s *Princ. Eq. Pl.*, ch. VI, p. 95.

² Supreme Court Rule 3; Equity Rule 90; Circuit Court of Appeals Rule 8; *Southern Nat. Bank v. Darling*, 49 N. J. Eq. 398; *Newark, etc. R. Co. v. Newark*, 23 N. J. Eq. 515; *Jones v. Boston*, 4 Pick. 510.

made, the principles of the old system pervade the new structure. Even where law and equity pleading are blended, each of the constituents retains characteristics of its origin.

It will be seen that an adequate equipment for successful practice in the federal or state courts of the Union requires a knowledge of English chancery procedure as well as that of the local laws. No changes have wholly eliminated from the jurisprudence of England or America the principles and rules of the "ancient and honorable" English high court of chancery.

CHAPTER XVIII.

EVIDENCE.

- SECTION** 138. Evidence defined.
139. Kinds of actions.
140. Kinds of evidence.
141. Oral evidence.
142. Discrediting witness.
143. Documentary evidence.
144. The primary rules of evidence.
145. Circumstantial evidence.
146. Personal identity.
147. Expert testimony.
148. Medical jurisprudence.

§ 138. **Evidence defined.**—Evidence, in a general and popular sense, “signifies that which makes evident or manifest; the ground of belief or judgment; conclusive testimony; a statement which contains proofs which are clear to the perception and satisfactory to the judgment. In law, that which is legally submitted to a competent tribunal, the means of ascertaining the truth of any alleged matter of fact under investigation before it; the means of proof—the latter, strictly speaking, not being of like significance *with evidence*, but rather the effect or result of it.”¹

Otherwise stated, evidence is the light in which the affairs of society are adjudicated, relations defined, rights enforced, wrongs redressed and controversies settled. It is the search-light of the courts for the discovery of truth and the exposure of falsehood.

¹ Webster's Unabridged Dic.; Best's Princip. of Ev., § 11; Greenl. Ev., § 1; 1 Starkie, Ev. 10; Wharton's Ev., § 3.

The terms *evidence* and *testimony* are quite generally used indiscriminately in practice as having the same significance. This use of the terms is not in all cases strictly accurate. This lack of accurate discrimination, however, is rarely, if ever, misleading, as the context will indicate in what sense the term is used in every instance. With this explanation the author will feel at liberty to disregard the discrimination in question in the following pages, in deference to convenience. The reader will bear in mind that it is the *weight* of *evidence* and not the *quantity* of *testimony* which determines the issue.

§ 139. **Kinds of actions.**—The grievances in society, real and fancied, requiring judicial interposition are so numerous and varied that some classification of actions is indispensable to a due administration of justice. It rarely, if ever, happens that any two cases are the same in all their features; and hence the rules adopted and decisions made in one would not necessarily furnish precedents for all. The result would be constant embarrassment and conflicting decisions. But enough causes involving like principles are decided and reported to form precedents for future cases of the same kind. Thereafter, the court would have forms and rules to guide in cases involving substantially the same principles. Thus, in process of time, grew up the great body of the English common law, with occasional contributions from parliament. At the time when this system came to the United States as an inheritance from the mother-country, an intelligent and thoroughbred lawyer, when fully and correctly instructed in the facts of his client's case, would know at once where and how to seek redress for an injury, or to defend against an unjust charge.¹

¹ 2 Cooley's Bl., pp. 39, 41.

There are several kinds of legal actions, the leading ones being actions of contract and actions of tort, each of which has its proper form and rules of procedure and evidence. It may, however, and sometimes does in fact, happen that a case of novel impression occurs, to which neither form of action applies; but there need be no failure of justice for this reason, the ingenuity and resources of the judiciary having been equal to exigency. A good example, by way of illustration, is furnished in the now well known action of "trespass on the case." At one period of the English system, the courts in Westminster could not take cognizance of cases of certain civil actions unless the defendant were an officer of the court, or in the custody of the marshal or prison-keeper of the court, for a breach of the peace or any other offense. In process of time, however, the courts in Westminster entertained jurisdiction of all personal actions, by a fiction of law; the defendant being arrested on a writ issued out of the high court of chancery, on the assumption that he was arrested for the commission of a trespass, which he is not at liberty to deny. Thereupon the plaintiff might count upon any cause of action which he might have done for the technical limitation of the court's jurisdiction.¹ This action, technically termed "trespass on the case," served its purpose so well that it was speedily adopted into the family of actions, and has since maintained a high standing.

To the uninitiated the term *fiction* in connection with the administration of justice has a malodor, and is sometimes treated as a reproach to the profession, rendering its members unworthy of confidence. The great injustice of this aspersion will appear when it is known that none of the numerous legal fictions found in the books is ever

¹ 2 Cooley's Bl., p. 39; Gould's Pl., p. 47 *et seq.*

used by the courts, except in cases where it will aid in the establishment of truth, and serve a beneficent purpose in the administration of the law.¹

§ 140. **Kinds of evidence.**—An exhaustive discussion of evidence does not enter into the plan of this work; that would require volumes instead of a single chapter; it is the intention of the author to present only the leading principles, and cardinal rules involved, together with references to such authorities as will guide the reader to a more detailed study of the subject.

§ 141. **Oral evidence.**—This kind of evidence, generally and not incorrectly denominated *testimony*, is given orally by the witness in open court under the direction of the presiding magistrate, and in accordance with the rules of law. It may, however, and in some cases is, taken on commission and read on the trial of a pending issue. In whatever way taken it is, as a rule, delivered by the witness under the sanction of an oath, which appeals to Almighty God as witness of its truth, and subjects the witness to the penalty both of Divine and human law attached to the crime of perjury, if his testimony be knowingly false in any material part. In the early history of our system of jurisprudence, if a person were proposed as a witness on one side, and objected to on the other as incompetent on the ground of atheism, and the truth of the charge was established, the objection prevailed, and the offered witness was not permitted to take the oath or to give testimony in the case. It seemed to be thought in these simple times that an appeal by the witness to a being in whose existence he did not believe, added nothing to the value of his testimony, and was nothing more nor less than an impious mockery.

¹ See authorities last above; Best, Princip. Ev. 314.

This rule was regarded by many as unjust and illiberal, inasmuch as it made the enjoyment of civil rights dependent upon a religious dogma, and that for this, and other reasons not necessary to discuss at present, ought not to be treated of competency. On an incoming tide of liberal sentiment the obnoxious rule disappeared quite generally, if not wholly, from the jurisprudence of Christendom. Whatever the justice and reason of the rule in question, it may be doubted, all things considered, if anything of value to society has been gained; but it is useless to inquire, since there is no expectation in any quarter of an attempt to revive the dead rule.

§ 142. **Discrediting witness.**—This may be done in different ways, both by an attack upon his character, and an impeachment of his testimony.

1. *By cross-examination.*—This is one of the most convenient and effective methods. The witness is subject to a rigid, incisive and searching examination which few persons can endure without exposure if the direct testimony be false in any material particular. The witness' character and life are laid open to inspection, and a skilful cross-examination will seldom fail to reveal any defects in either; especially is this true when the testimony is elaborate or complicated. And it not infrequently occurs that the introduction and testimony of such a witness discredits the honesty and good faith of the party calling him, and seriously injures his case.¹

For the benefit of students preparing for the practice of law as a profession, it may be well to suggest that cross-examination successfully is one of the most delicate and difficult duties that they will have to perform. A single

¹ Best, *Princip. of Ev.*, pp. 91, 126, 272, 449, 631, 632, 633, 643, and authorities there cited, respectively.

imprudent or maladroit question may open the door to the introduction of evidence from the other side which would otherwise be inadmissible, and which may seriously damage, or even completely wreck, the examiner's case. Some counsel seem to think that the more numerous and miscellaneous their questions, pronounced in a pompous or threatening tone, the more impressive and effective is the effort. This is a mistake; it may win applause for the counsel from the unthinking crowd, but will be quite likely to injure the cause of his client. Such a performance was wittily epitomized by a Virginia editor in reporting incidents in the trial of John Brown for treason; he said of a young man who had come from a distant state as a volunteer assistant counsel for the defense — "He would often take the floor, open his fussy-gussy and let miscellaneous things rip generally."

2. By leading the witness to contradict himself, by showing that he has made statements out of court which are wholly incompatible with his testimony under oath.

3. Showing by persons well acquainted with the witness that his reputation for truth and veracity in the neighborhood where he resides is bad, and that from the speech of people he would not believe him on oath.

4. Showing by reliable evidence that the testimony of the witness was wholly untrue in fact, or materially colored in favor of his employer.

§ 143. Documentary evidence.— This title constitutes a comprehensive division of evidence, and, as the name indicates, is the opposite of oral evidence. For the sake of convenience and brevity, the name here embraces other species of evidence, non-oral, of which the books treat under different heads. The instruments of various kinds, written, engraved, or by whatever means intelli-

gibly expressed, when properly authenticated, speak for themselves. They may be impeached for forgery or other fraud in their inception or execution; but when not impeached they stand just as expressed on their face, leaving nothing for the court but their proper interpretation and bearing upon the case in hand. The term "document" has been variously defined in legal literature, creating some confusion in regard to its significance, which is due, in part at least, to the variety of this class of documents, and in part, perhaps, to the pride of authorship. Wharton defines the term "as an instrument on which is recorded by means of letters, figures or marks, matter which may be evidentially used."¹

The foregoing summary contains in a condensed form the main features of documentary evidence, omitting unimportant variations and minor rules, in pursuance of the general plan of this work.

There are other rules and topics pertaining to the general subject of evidence which are of sufficient interest and importance, especially to the student of law as a profession, to require brief notice in passing. These will now be selected discriminately, without regard to relationship, and briefly considered.

§ 144. The primary rules of evidence.—1. It is a primary and leading rule that the evidence adduced should be directed and confined strictly to the issues formulated for trial. These issues, if framed in conformity to the rules of good pleading, contain all the matters in controversy between the parties embraced in the pending action, and reduce to a logical conclusion all the allegations that precede, and present for the court or jury a single question for decision. Evidence that does not

¹ Wharton, *Ev.*, § 614; and see Best, *Princip. Ev.*, p. 215.

comply with this important rule will be rejected by the court as irrelevant. This rule reveals the intimate relation between pleading and evidence.¹ 2. That the burden of proof rests upon the party who would suffer defeat in case no evidence were given on either side. 3. That it is sufficient for the party on whom the burden of proof rests to prove the substance of the issues presented by the pleadings.

The secondary rules are more numerous, but of little interest or importance to any except students who are fitting for the practice of law as a profession. They will therefore be omitted in accordance with the plan of this work, giving place to subjects interesting to all readers.

§ 145. **Circumstantial evidence.**—All judicial evidence is embraced in two classes: direct and circumstantial. Evidence in which the principal facts are shown by the direct testimony of witnesses, or documentary proofs, is direct; all other evidence is circumstantial.² Our books contain much learned discussion of this branch of the subject which need not here be presented; any reader of ordinary intelligence will readily understand sufficiently for his purpose the general meaning and scope of the respective classes of evidence, direct and circumstantial; leaving open to present and prospective members of the legal fraternity the wide field of discussion. In regard to the value and safety of the respective classes of evidence there has been, and still is, a pronounced difference of opinion. It is urged against circumstantial evidence that it is very uncertain and unreliable; and in support of this contention cases are cited where circumstances, it was thought, pointed conclusively to the guilt

¹ Best, Princip. Ev., p. 257 *et seq.*; and see *ante*, ch. XVII.

² Best, Princip. Ev., 292 *et seq.*, and cases there cited, p. 48a.

of an accused party, but where subsequent developments established his innocence beyond all possible doubt. Such cases have occurred, also, under direct testimony, although less widely known, or advertised when known. In neither case is it sound reasoning, or safe, to predicate general rules upon extreme or exceptional cases. It may be plausibly argued that circumstantial evidence is more exposed to the danger of mistakes and falsehood than direct, inasmuch as the contributory facts constituting the circumstances are the product of direct evidence concentrating in a single case the dangers incident to several cases of the other class. Given a certain number of circumstances constituting a case, with a certainty that each is unimpeachable, a true result is assured; but if some of the circumstances are of doubtful integrity we are launched upon the treacherous sea of uncertainty, burdened with the imperfections of several cases of direct testimony. There is reason to question whether, in our professional literature, and in the administration of justice, sufficient attention is given to the character of the elements of evidence. In this view circumstantial evidence may be more dangerous than direct. But however this may be, there is a well-established rule applicable to circumstantial evidence which largely eliminates the danger involved. To entitle this evidence to any consideration by court or jury, there must be a perfect agreement between all the circumstances; each one must exactly fit the niche assigned it, must be entirely consistent with the theory propounded, and wholly inconsistent with any other known or reasonably conjectural hypothesis. The writer once heard this rule happily and forcibly illustrated in a judge's charge to the jury on a trial in which the result depended upon the effect to be given circumstantial evidence, and occurred in the even-

ing. The court room was brilliantly lighted from a large glass globe suspended from the ceiling. Said the judge to the jury, in substance, pointing to the globe, Should that globe fall to the floor and be dashed into pieces, and the pieces when gathered up and placed together so perfectly fit each other as to make a perfect globe and reproduce the original, it would be a case of most convincing circumstantial evidence; otherwise the whole of the offered evidence should be rejected.

§ 146. **Personal identity.**—Cases sometimes occur involving the identification of persons, both of the living and the dead, which present great difficulties. Dead bodies are often found in a mutilated condition, and in various stages of decomposition, rendering identification exceedingly difficult, if not impossible. Cases of doubtful or disputed identity occur which present remarkably fortuitous resemblances between individuals of different lineage, both in their general personal appearance and in peculiar marks and features, natural and post-natal. There are also on record cases in which long absence and other circumstances have wrought such changes in personal appearance as to prevent recognition by the nearest relative. It is a well known historical fact that from the effect of sudden and violent emotions, terror, grief, and the like, the hair is sometimes changed from raven black to snowy white in a single hour. There is truth as well as beauty in the lines from Scott's *Marmion*:—

“Danger, long travel, want and woe,
Soon change the form that best we know;
For deadly fear can time out-go,
And blanch at once the hair;
Hard toil can roughen form and face,
And want can quench the eye's bright grace,
Nor does old age a wrinkle trace,
More deeply than despair.”

An example of attempted identification of the dead and living, respectively, will serve for illustration of the truth in question. And first of the dead. The following case is reported in the *Edinburgh Monthly Journal* for February, A. D. 1854. The body of a man, between sixty and seventy years of age, was found slightly imbedded in the sand on the banks of a river; both eyes had been pecked out by hooded crows, but decomposition had made no progress. The left ear and the first finger of the left hand were wanting, presenting the appearance of having been lost in early life. The body was conveyed to a suitable place and identification sought through the medium of advertisements. After a time two young women claimed it as the body of their father, who, they stated, was a lawyer; that he was in the habit of leaving home for two or three weeks at a time without informing them where he went; and that he had lost the left ear and the first finger of his left hand. They apparently recognized the clothes and the body, and gave way to expressions of grief. Subsequently doubts arose in the mind of one sister, but were overruled by the confident affirmations of the other. The funeral took place accordingly, and was attended by the daughters and friends of the deceased lawyer. Returning from the funeral, the boatman of the ferry which they had to cross, asked them for whom they were mourning, and upon receiving their answer, laughingly informed them that he had, only half an hour before, ferried their father over alive and well, and directed them where they could find him. This, to their great joy it is said, proved true. The report does not show whose body was thus tenderly laid to rest in the churchyard.

Identification of the living.—The case of Martin Guerre of France affords a remarkable example of perplexity

and embarrassment in identification of the living, which was in substance as follows: He had been absent from home continuously for about eight years, without being heard from by his friends, when a man appeared in the neighborhood and claimed to be the long-lost Guerre. So close was his resemblance to the missing man that his claim was allowed by all of Guerre's family, including wife, four sisters, and two brothers-in-law. The claimant settled down cosily in the family nest, and wielded the scepter of domestic lord, and the broken thread of family life was re-united. The adopted husband and nominal widow lived together in connubial harmony. In due course of time two annuals were added to the family group of children. Ultimately, however, circumstances arose causing doubt in regard to the identity of the claimant of the name, rights and privileges of the absent Guerre; and he was arrested and brought before a criminal judge on a charge of fraud. On his trial, about one hundred witnesses were examined; of whom between thirty and forty testified from a life-long acquaintance that the prisoner was Martin Guerre; while about the same number swore positively that he was Arnaud du Tilk, whom they well knew, and over thirty persons who knew them both, declared under oath that they were unable to decide which was the true Martin Guerre. The prisoner was convicted of the crime and condemned to death. He appealed to the Parliament of Toulouse, where the same difficulty of identification occurred. On the trial four of Guerre's sisters testified among others that the prisoner was the true Martin Guerre. While the trial was in progress, the vexed question was satisfactorily solved by the appearance in court of Martin Guerre in proper person; when, seeing the two persons together, the sisters recognized their brother. The pris-

oner was condemned and executed. Many more illustrative examples might be cited, but these are all that space will permit, and enough, it is judged, for the purpose.

§ 147. **Expert testimony.**—This subject is here introduced on account of its great importance. It does not, like testimony in general, consist only of facts assumed to be within the knowledge of the witness, but of his opinion or judgment of facts in the case, given by himself or otherwise introduced. The court and jury are required to pass upon the correctness or value of his opinion upon facts proved or assumed. Manifestly, this kind of testimony is dangerous, being especially liable to be unduly affected by interest, prejudice and false coloring. And the danger is augmented by the fact that the witness does not testify under the wholesome fear of the penalty prescribed by the criminal law for false swearing; for it would generally be impossible for court or jury sitting in judgment upon him to distinguish between truth and falsehood without knowing what was in the witness' heart.¹ The caution of receiving this kind of testimony without careful scrutiny derives additional importance from the great variety of subjects on which it is admissible. The subject of insanity is especially prolific of expert questions; and the various forms of mental alienation greatly multiplies the number.

The questions on which the opinion of alienists may be invoked are numberless, embracing, among others, responsibility to the criminal law; the validity of contracts, wills and other documents; personal identity, especially of the dead; establishing age from the skeleton, the teeth, and other things which would mean little or nothing to a non-expert; determination of sex by the same means; the time of death from the decomposition of the body by

¹ Best, Princip. Ev., p. 494 *et seq.*

the elements; death from poisons of various kinds, gunshot wounds and other bodily injuries. The sciences present numerous questions for expert testimony, as do also patent controversies involving either the validity or the infringement of patents, or both; values of property and services of which the expert has exceptional knowledge, and many other things too numerous for mention in this brief presentment of the subject.

There are men who make it a business or profession to prepare for and testify as experts in pending cases of importance; they are known and much sought in important cases, and not sought in vain where the *honorarium* is sufficient; they often demand and receive a larger compensation than counsel in the case. It is not intended to be affirmed that this kind of evidence should be wholly rejected; on the contrary, it is of great value in some cases, if not indispensable. Nor is it intended to be intimated that all such testimony is mercenary and unworthy of credit, for experts may be found of unquestionable integrity and worthy of implicit confidence. It is only meant to sound a note of warning to the inexperienced against the danger incident to this kind of testimony.

§ 148. Medical jurisprudence.—This is defined as “that science which teaches the application of the practice and principles of medicine to the elucidation and settlement of doubtful questions arising for investigation in courts of law.”¹ Its field of investigation and authority is very wide, embracing a great variety of subjects, including, among others, the validity of contracts of various descriptions, wills and other documents, questions of divorce, legitimacy of children, and other subjects for judicial investigation.

¹ Dean's Med. Juris., p. 1.

CHAPTER XIX.

THE PLEA OF INSANITY.

The following paper, constituting this chapter, was read before the Albany Institute, January 31, 1882, and published in the proceedings of that institution in volume X, page 290:

[Inserted here by permission.]

THE PLEA OF INSANITY.

By Horace E. Smith, LL. D.

The extraordinary trial of Guiteau for the assassination of President Garfield has directed public attention with unusual interest to the defense of insanity in criminal prosecutions. The subject involves questions of great importance and considerable difficulty. It is the aim of this paper to present briefly, in outline, the present status of the subject, with some of the difficulties surrounding it, and the vexed questions involved. Its main design is to stimulate thought and discussion which may contribute to the realization of a more just, uniform and satisfactory administration of the criminal law when the plea of insanity is interposed as a defense. The objective point of all inquiry and discussion is the adoption of such rules and methods as shall be most likely to secure the conviction of responsible parties and protect the irresponsible when charged with crime and convicted of the overt act. Now, unfortunately, it often happens that guilty parties escape through the plea of insanity, while sometimes, possibly, the irresponsible insane are convicted and punished. This defense has become so common, and is often interposed on such weak grounds, that

the popular mind has come to regard it with marked disfavor, and courts even look upon it with a wary and suspicious eye. And yet, if legal insanity really existed when the crime was committed, there is no better or more meritorious defense known to the law.

An essential ingredient of crime, especially crime of the grade of felony, is *criminal intent*; and this implies a sane mind, without which such intent cannot exist.

For convenience of presentation, and without special reference to logical arrangement, the subject will be examined under three heads:

The *Fact*, the *Law*, and the *Procedure*.

First, the *Fact*:

The plea of insanity presents a question of fact for the jury which is both a question of fact and a question of science; not a question of *physical* science, but of *metaphysical* and *psychological* science.

If the court and jury and expert witnesses had to deal with physical facts alone, which may be subjected to the tests of experimental and demonstrative science, their task would be comparatively easy. But they have to deal with the *outward physical* manifestation of *inward immaterial occult forces*.

The astronomer, by the aid of his instruments and mathematical science, is able to make an accurate survey of the heavens, weigh the planets as in a balance, and trace their orbits with unerring precision. The scientist, with his glass, reveals the wonders of the microscopic world, and makes the solid earth seem instinct with organic life. But with what instruments shall the psychologist examine the soul? By what science, pure or applied, shall he determine its nature? By what mathematics, speculative or mixed, shall he unfold with precision its laws and powers? The surgeon cannot subject

it to his knife, nor the anatomist to his scalpel; it is beyond the power of chemical analysis; it will not respond to the requisition of the microscope. What is it? Where is it? What is the *fact* and *law* of its connection with the body? These and other questions may easily be asked; but an attempt to answer them satisfactorily will at once reveal the intrinsic difficulties involved. And these difficulties are presented by the mind in its *normal* state, studied by a mind in the same condition, when the investigation is aided by introspection, the observer beholding in himself, as in a mirror, the general features of his study. But how immeasurably are the difficulties increased when the subject is a mind in its *abnormal* state; when, instead of light and divine order, there is darkness and tumultuous chaos; and when the student finds no assistance from corresponding features within himself! Dr. Elwell, in a recent issue of the North American Review, writes thus: "The human mind, connected as it is with matter, so far as we know anything about it, in its best estate, is an unknown quantity, having no unit or standard of measurement by which it can be accurately defined. Hence it is often most difficult, or even impossible, to determine precisely when there is a departure from a healthy standard, or normal condition. No two individuals being alike in their normal condition of mind, it follows that each must be his own standard for comparison, and that an uncertain one. No words in the language have yet been able to define mind sane or insane, and it has no synonym but mystery. Over the portal that leads to the luminous temple where thought dwells, the pilgrim who would enter there sees written in letters of living light the inscription, "Put thy shoes from off thy feet, for the place whereon thou standest is holy ground." It is the temple of an unknown God,

and whosoever would rush unbidden into this presence, thinking to sit face to face with and understand its mysteries, is but little less than a madman himself. Whether the subject is sanity or insanity, it will be found firmly and securely intrenched behind ramparts, and surrounded by insurmountable difficulties — *a terra incognita*. The difficulties are augmented by the great variety of forms and hues which mental alienation assumes. From the raving maniac, exhibiting the fury of a demon and the strength of a giant, there are all degrees and shades, down to the imbecile, or the morbid misanthrope seen in the picture of Byron as drawn by himself in *Manfred*. The perplexities of metaphysical study are also enhanced by inharmonious theories on the subject of mental unsoundness. The leading schools are the *psychic* and *somatic*. The former is based on the assumption that the primitive source of insanity is in the soul itself, and the soul is what originally suffers, imparting, when there is sympathetic insanity, its malady to the brain. The latter, the *somatic* theory, assumes that the soul itself, as such, is incapable of originating a disease; that the occasion of every affection of the mind is to be found in some abnormal bodily development; and that aberrations of the mind are nothing more than the disturbance of some functions of the soul produced by bodily abnormalities. There is a third, or *intermediate theory*, which attributes to the body and the soul alike originative influence in the growth of mental disturbances. This theory has able advocates, and may be the golden mean of truth between the two extremes. There are phenomena difficult, if not insusceptible, of explanation upon either of the extreme theories alone; and the intermediate theory which recognizes the reciprocal influence of body and soul in mental alienation seems to resolve some difficulties not

otherwise explainable. While these conflicting theories complicate medico-legal investigations to a considerable extent, they are not so embarrassing as at first view might be supposed; and this for the reason that whatever theory be adopted respecting *cause*, medical experts have to deal mainly with *effects*.

The disciples of the *psychic* and the *somatic* school alike deal with phenomena, which in particular cases are the same, whether the producing cause originated in the body or soul. While it is easy for medical experts to differ when interest or feeling excites antagonism, on the other hand, it is comparatively easy for them to agree when they speak to the *phenomenal* rather than the *causal* character of the case before them. In all matters of science and philosophy, and especially on metaphysical or psychological subjects, there has always been, and probably always will be, a tendency to speculative theories and over-worked hobbies. Men of a speculative cast of mind and a controversial disposition will sometimes frame a theory upon a very limited number of facts, experiments or observations, and thereafter adjust everything to *it*; bending facts and phenomena to such a theory when they will yield, and boldly questioning or ignoring them when they will not. There are few men who possess the requisite force and grasp of intellect, combined with a well-balanced mental organization, coolness or judgment, freedom from emotional disturbance, patience to wait the slow processes of inductive methods, and perseverance to push them to legitimate results, which are indispensable to safe conclusions in the realm of psychological investigation. Such men there are, however, and they are making steady advances in psychological medicine; and we may reasonably hope that at no distant day their labors will result in relieving medical jurisprudence from some of its present embarrassments.

Within a comparatively recent period *moral insanity* has become a disturbing element in medical jurisprudence. By this name is meant insanity of the *moral system*, co-existing with sanity of the *mental*. It assumes that the moral and mental functions are so separable that one can be insane without involving the other; and that this severance actually exists in cases of moral insanity. It is claimed by the highest authorities that this species of alleged insanity has, psychologically, no existence, and it is generally repudiated as a legal defense. It will have been noticed by readers of the Guiteau trial, that the most distinguished experts there examined deny the existence of moral insanity. It still finds distinguished advocates, however, both among alienists and jurists; and even when overruled as a defense, it doubtless creeps into the jury box and secures a verdict of "not guilty," against law and evidence. The perplexity caused by this alleged species of insanity is greatly increased by its numerous subdivisions into the large and increasing family of *monomanias*. Among these may be mentioned homicidal mania, kleptomania, pyromania, erotomania, pseudomania, oikeiomania, dipsomania, fanatico mania and politico mania. In his testimony in the Guiteau trial Dr. Gray stripped from some of these *manias* the Greek costumes in which they posed and *imposed*, and left them in their naked deformity and moral depravity as *murder, arson, theft and drunkenness*. Under the nomenclature of moral insanity a person may lie, steal, ravish, burn and kill, *ad libitum*, and go unwhipped of justice.

The doctrine once fully established and universally recognized that there can be no moral insanity independent of mental, a convenient cover for moral depravity will have been removed and the administration of criminal justice relieved from embarrassment.

Secondly, the law.—When insanity is interposed as a defense, the court lays down the rule of criminal responsibility and the jury pass upon the fact of insanity. In dealing with the issue a clear discrimination between *medical* and *legal* insanity is of the first importance. A recognition of the doctrine that the presence of medical insanity is not of itself alone a valid excuse for crime will greatly narrow and simplify the question. Establish a uniform rule touching legal responsibility, and so far as the administration of justice is concerned, it would matter little how wild the theories or how fierce the conflict in the domain of medical insanity. What is the true rule in respect to penal responsibility? In 1843 the English House of Lords propounded certain questions on this point to the fifteen judges, and received in substance the following answer:

“The jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.”

This rule, as an abstract proposition, is adopted by the English courts, but, like most common-law rules, it is flexible, susceptible of adaptation to various circumstances, and the judges have been liberal in its administration. It is termed in common parlance the “right and wrong test,” and is applied with greater or less strictness in many, perhaps a majority, of the American states.

Were this the only and the uniform test of responsibility, the issue of insanity would be comparatively simple. But it is held by high authority, and with much strength of reason, that the "right and wrong test" is not in all cases the only one by which penal insanity is to be tried. It is claimed that the defense is sustained when, first, there was an insane delusion from which the crime emanated; and secondly, that when being insane the defendant was forced to the act by an irresistible impulse, although in each case he knew that the act was forbidden by the laws of the land.

These propositions may be stated with a little more fullness and accuracy, thus: "First, when the defendant was acting under an insane delusion as to circumstances, which, if true, would relieve the act of responsibility, or where his reasoning power is so depraved as to make the commission of the particular act the natural consequence of the delusion." Secondly, "where the defendant, being insane, is forced by a morbid and irresistible impulse to do the particular act."

Under the present English practice, "the delusions which indicate a defect of insanity such as will relieve a person from criminal responsibility are delusions of the senses, or such as relate to facts or objects,—not mere wrong notions or impressions, or those of a moral nature; and the aberration must be *mental*, not *moral*. It is not enough that the delusions show a diseased or depraved state of mind, or an abnormal condition of the moral feelings, if the sense of right and wrong, although perverted, be not destroyed.

There is some contrariety of opinion among the jurists of this country upon this question, but the trend is in favor of the insane-delusion defense, under proper limitations. It is important to notice that the delusion con-

stituting a defense must be that of an *insane* person. If he has sufficient reason to dispel or correct the delusion, and refuses or fails to do so, he is responsible before the law. One author, in illustration of this point, says: "Thus the Mormon prophets claim, it is said, a direct revelation permitting them to practice polygamy. Would they be permitted to plead their delusion in this respect as a bar to an indictment? Certainly not. And the reason is that they are shrewd, sane men, and must therefore be held responsible for their delusions. There are many recorded instances of men subject to delusions, who were sane beyond question, and had full control of themselves. For example, Lord Castlereagh, who had a vision of a "Radiant Child;" President Lincoln, who saw two images of himself in the mirror at the same view; and Lord Kenyon, who had a morbid apprehension of impending poverty. There is a marked contrast between these instances and cases in which the delusion is so extended as to implicate the whole mind, producing incoherence of thought and speech. Dr. Rush reports the conversation of a patient belonging to the latter class, as follows:

"No man can serve two masters. I am Philip, King of Macedonia, lawful son of Mary, Queen of Scots, born in Philadelphia. I have been happy enough ever since I saw General Washington with a silk handkerchief in High street. Money commands sublunary things, and makes the mare go; it will buy salt mackerel made of tenpenny nails. Enjoyment is the happiness of virtue. Yesterday cannot be recalled. I can only walk in the night-time when I eat pudding enough. I shall be eight years old to-morrow. They say R. W. is in partnership with J. W. I believe they are about as good as people in common—and better, only on certain occasions, when,

for instance, a man wants to buy chinkapins, and to import salt to feed pigs. Tanned leather was imported first by lawyers. Morality with virtue is like vice not corrected. L. B. came to your house and stole a coffee-pot, in the twenty-fourth year of his majesty's reign. Plum pudding and Irish potatoes make a very good dinner. Nothing in man is comprehensible in it. Born in Philadelphia. Our forefathers were better to us than our children, because they were chosen for their honesty, truth, virtue and innocence. The queen's broad R. originated from a forty-two pounder, which makes too loud a report for me. I have no more to say. I am thankful that I am no worse this season, and that I am sound in mind and body and memory and could steer a ship at sea, but am afraid of the tiller. . . . Son of Mary Queen of Scots. . . . Born in Philadelphia. King of Macedonia."

There can be no doubt of insanity in this example, but it may be considered as a sound and pretty well established doctrine that a delusion in a sane person does not relieve him from responsibility. It is important also to notice that an *insane* delusion is a good defense only when the act charged as a crime was the offspring of such delusion. The defense of "irresistible impulse" is rejected by the English courts, but is recognized as valid by some American authorities. In Iowa, Chief Justice Dillon, delivering the opinion of the supreme court in the case of Felter, tried for the murder of his wife, said: "The capacity to distinguish right and wrong is not always a safe test of criminal responsibility. If a person commits a homicide, knowing it to be wrong, but driven to it by an uncontrollable and irresistible impulse, arising not from natural passion, but from an insane desire and condition of the mind, he is not criminally liable." The

"irresistible impulse" allowed by some courts as a valid defense is not, it must be remembered, *moral insanity* as already defined, it is not the stress of passion, nor is it the expression of malignant depravity; *it is the overpowering force of insanity.*

There is not so wide a difference, practically, on the question of legal insanity as an affluent and varied nomenclature naturally suggests. Dr. Folsom, in the same number of the North American Review from which we have quoted, thus sums up the conditions of legal responsibility at the time of the act: First. Sufficient mental capacity for ordinary reason, reflection and judgment. Secondly. The knowledge of right and wrong as applied to the particular act. Thirdly. The power of self-control within reasonable limits. Fourthly. The absence of insane delusion overpowering reason, the character and strength of the false belief to be judged in each particular case and not by any general definition of insane delusion, that being impossible."

The question of the burden of proof in cases of alleged insanity has elicited much discussion and resulted in considerable confusion and conflict in judicial opinion. It may be considered that *sanity*, being the normal condition and generally the *actual* condition of the mind, is always presumed. The prosecutor may rest upon this presumption until evidence of insanity is introduced for the defense. Just here comes the conflict. What degree of evidence is necessary to overcome the presumption? After the introduction of such evidence for the defense, does the burden rest upon the prosecution to satisfy the jury beyond a reasonable doubt that defendant was legally sane when he committed the act?

First. That insanity as a defense, the same as what is technically known as confession and avoidance, must be

proved by the defendant beyond a reasonable doubt; and unless such proof be furnished, the case for the prosecution being otherwise proved, the jury must convict. This view was taken by the late Chief Justice Hornblower, of New Jersey, a man of great worth, and a jurist of distinguished ability; but it is not generally adopted.

Secondly. That upon the issue of insanity the jury must be governed by the preponderance of the evidence; that while the burden is on the defendant, he is not required to prove insanity beyond a reasonable doubt.

Thirdly. That upon the main issue of guilty or not guilty, the burden of proof rests upon the prosecutor from the beginning to the end of the trial. That to secure a conviction it must be shown that the prisoner was sane when he committed the deed, and for the reason that he cannot be guilty if a sane mind never consented to the act, and the fact of such assent is put in issue by the plea of "not guilty."

But upon the particular question of insanity the *presumption* is sufficient for the prosecutor in the first instance. When, however, evidence of insanity is introduced, it must be considered in connection with the presumption, and if, when so considered, the jury have reasonable doubt of the prisoner's sanity, they must acquit. This is substantially the doctrine in New York, as authoritatively announced by the court of appeals. It is forcibly and plausibly urged in an approved work on Medical Jurisprudence, that this conflict is due to the mistake of viewing the plea of insanity as in some way entering into the merits of innocence or guilt. That the maxims of criminal jurisprudence, constructed to guide in determining the question of guilt or innocence, have no application to the issue of insanity. That the presumptions of innocence and of intent assume that the de-

fendant is either innocent or guilty; but if the plea of insanity is good he is not a moral agent and can be neither. The defense being, it is said, "that he is not amenable to penal adjudication — that he is a being outside the law — the maxims as to guilt or innocence belong entirely to another issue, and have no relevancy." This reasoning, so far as it applies to the question of the burden of proof, makes in favor of the rule requiring a preponderance of evidence to sustain the plea of insanity, and the weight of judicial authority has been in the same direction, but the tendency seems now to be in favor of the rule adopted in this state.

Whatever may be said of the logic of this rule, practically its application meets with serious difficulties. If the burden of proving sanity beyond a reasonable doubt to the minds of the average jury be thrown upon the prosecution, it is quite apparent that the task of securing a conviction for a capital crime becomes exceedingly difficult. The nomenclature, the conflicting theories of psychologists, the unsettled rule of criminal responsibility, the facility of securing extraordinary expert testimony, and the weakness of juries, would conspire to embarrass the prosecution and insure impunity to crime.

The question, What is the theory of civil government, and the purpose of penal law? has some bearing upon this subject. Does human government deal with man simply as a member of society, or does it take cognizance of his relations to the divine law and assume to enforce its claims and sanctions? Is punishment for crime designed as a protection to society, or as a moral discipline for the transgressor? Each of the theories indicated by these questions has its advocates, and there are, moreover, afloat in community some very crude notions upon the general subject. The adoption of a correct theory is im-

portant in adjusting the true standard of responsibility for insane criminals. If human government regards and treats man simply as a member of society, and inflicts punishment for crime as a protection to society, it is manifest that a stricter rule of responsibility is allowable, nay, indispensable, than would be the case should it attempt to adjust its penalties to a moral scale and make the good of the offender's soul the purpose of the criminal code. The latter theory, carried to its logical result, would require the abolition of capital punishment, and it would be an interesting inquiry whether the opponents of capital punishment do not, as a rule, adopt an erroneous theory of government. What is the true theory? This question is answered by President Hopkins, one of the most profound thinkers of the age.

In a discourse delivered before the legislature of Massachusetts, discussing the divine and human government, respectively, to the ends of individual and social existence, he says "that human governments regard man solely as member of community, whereas it is chiefly as an individual that the government of God regards him." "Human government is chiefly a system of restraint for the purpose of protection. Its object is to give equal protection to all in using their faculties as they please, provided they do not interfere with the rights of others. Government, then, is not an *end*, but a *means*. Society is an end, and government should be the agent of society, to benefit man in his social conditions."

Dr. Elwell, in the paper from which we have quoted, thus forcibly presents his view in its relation to the plea of insanity: "The theory upon which government proceeds to punish crime by the infliction of the death penalty, and upon which alone it can be justified, is that the existence of the criminal is dangerous to society, and that

society can only be protected by his death. If government attempts to reform the criminal, as is sometimes the case in crimes less than capital, even the primary object is the good of society, and not that of the offender. Criminal law is established by society for its own protection — not for the indulgence of revenge on the one hand, nor of a tender sentimentality in favor of the criminal, on the other. Certainly, the community at large has the same right to protect itself even to the taking of the life of an insane murderer, if need be, that an individual has when assailed with murderous intent."

In seeking the true rule of responsibility for insane criminals, some weight should be given to the fact that the fear of punishment is as great in the insane as in the sane, and has the same restraining influence. "In cases of low mental and moral culture," says an approved author, "the will, when on the brink of some forbidden act, is swayed by two conflicting emotions, *passion* and *fear*. Fear, in such cases, is the only check on passion. If it is removed, passion has no remaining barrier in its way. The state which declares that no irrepressible passion shall be punished, evokes the irrepressible passion it exempts. The necessary check on passion is fear; and punishment must be applied by government with such even hand that fear will be real and reasonable." The London Lancet says: "No doubt mental disease is mysterious in its operations and manifestations. No doubt weakened mental power and a low standard of moral sense leaves mankind an easy prey to violent passion and criminal desires. It is equally true that such natures are more easily controlled and influenced by the fear of punishment." If these theories are right, and penal law is designed primarily and mainly for the protection of society, it would seem to follow necessarily that the rule of responsibility for insane criminals cannot properly or safely be relaxed.

Thirdly, the procedure.—At present, both in England and in this country generally, the question of insanity is tried by the court and jury with the other issues in the case. The court lays down the rule of legal responsibility, and the jury determine the fact of sanity or insanity. In doubtful cases, and indeed in most, if not all, cases, expert testimony is submitted for the consideration of the jury on the question of insanity. This proceeding is often embarrassing and unsatisfactory. It unites issues unlike in their character, and in the kind of evidence apposite to each. If the prisoner is insane at the time of his trial, he should not be tried at all while in such a state. He is incapable of pleading; of employing counsel, or of conducting his defense. He is a person "*beside himself*." He is not amenable to penal jurisdiction; and the joinder of two issues in one trial involves a kind of judicial solecism, which naturally, if not necessarily, leads to confusion and embarrassment. If the question of insanity could first be determined by a competent commission or otherwise, the administration of criminal law in such cases would be more simple and satisfactory. Another and more serious embarrassment in the procedure arises from the necessity of submitting the delicate, and often very difficult question of insanity to an ordinary jury. The English jury system which we inherit has long been a theme of unqualified panegyric; and it must be conceded that, during some periods of English history, it stood between the sovereign and his subjects, a bulwark to the latter against the oppressive rule of the former. But it may be questioned whether the system has not outlived its usefulness, especially under a popular government.

In criminal cases, and notably where capital punishment follows conviction, ignorance is the prime qualification of the jury. Each juror drawn is challenged, and if

he has formed such an opinion of the innocence or guilt of the prisoner as would require evidence to change, he is generally held disqualified. In this age and quarter of the world, all intelligent persons read the newspapers; the newspapers publish accounts of homicides, especially those occurring in the vicinage; no person can read these accounts without forming such an opinion as would require evidence to change, and hence intelligent persons are, as a rule, excluded from the jury box. Under such a system, What does the average juror know of insanity in its occult phases? Just about as much as he knows of Hebrew, or the nebular hypothesis of La Place. Experts on both sides give conflicting opinions couched in language unintelligible to ordinary laymen; a long cross-examination follows, which sometimes only "darkens counsel;" then follow the arguments and appeal of counsel, which serve to dazzle and bewilder; and finally the judge delivers his carefully prepared charge, formulated with reference to the diverse theories and judicial conflicts upon the vexed question, and better adapted to a lawyer or an expert than an unlearned jury. By this time the jury know less, if possible, about insanity and the prisoner's mental condition than when the trial commenced. On retiring to their room, if they enter upon discussion, like Milton's devils they "find no end, in wandering mazes lost." The result will be a disagreement, or a *profound*, united *guess*; and if the latter, the chances are that an insane man will be executed for an irresponsible act, or that a responsible murderer will be let loose upon society.

Curran once cleverly satirized the jury system in a trial before Lord Avonmore, who piqued himself, and not unjustly, on his profound classical acquisitions. Philips relates the anecdote as he heard it from Curran's own

lips. The latter was addressing a jury of Dublin shopkeepers, so stupid and illiterate that the finest flights of his eloquence were lost on them; "I remember, gentlemen," said he, stealing a side glance at the unconscious and attentive Lord Avonmore, "I remember the ridicule with which my learned friend has been pleased so unworthily to visit the poverty of my client, and remembering it, neither of us can forget the fine sentiment of a Greek historian upon the subject, which I shall take the liberty of quoting to you in the original, as no doubt it must be familiar to all of you. It is to be found in the celebrated work of Hesoid called the *Phantasmagoria*. After expatiating on the sad effects of poverty, you may remember, he pathetically remarks:

*Nil habet infelix paupertas durius in so
Quam quod ridiculos homines facit."*

"Why, Mr. Curran," said Lord Avonmore, bristling up at once, "Hesoid was not a historian, he was a *poet*, and for my part, I never heard before of any such poem as the *Phantasmagoria*." "Oh, my good lord, I assure you he wrote it." "Well, well, it may be so; I'll not dispute it, as you seem so very serious about it; but at all events the lines you quoted are *Latin*, they are undoubtedly Juvenal's." "Perhaps, my lord, he quotes from the *Phantasmagoria*." "Tut, tut, man, I tell you they are *Latin*; they are just as familiar to me as my Blackstone." "Indeed, my good lord, they are Greek." "Why, Mr. Curran, do you want to persuade me out of my senses? I tell you they are *Latin*. Can it be possible your memory fails you so?" "Well, my lord, I see plainly enough we never can agree upon the subject; but I'll tell you how it can easily be determined. If it was a legal question, I should of course bow at once to your decision, but it is not,—it is a mere matter of fact, and there is only one way of de-

ciding it: send it up as a collateral issue to that jury and I'll be bound they'll *find it Greek*."

When the joke flashed upon the simplicity of Lord Avonmore, he literally shook with laughter.

One of the most serious embarrassments incident to the procedure is that arising from expert testimony. This class of testimony is, in most cases, a necessity. Questions to which alienists speak on the witness stand are often intrinsically difficult,—questions upon which there are honest differences of opinion among men of undoubted scientific attainments; but the worst difficulties encountered are adventitious. In the first place there is no rule or standard by which courts can determine who is and who is not entitled to speak as an expert. True, it is said that "neither quacks nor mere speculative theorists are admitted as experts. But who are "quacks," and who mere speculative theorists, and how shall courts decide these questions? A late writer well says: "Either the court must distinguish between rival schools, in which case it determines in advance the renditions of science as to which the experts are to testify; or it must decline so to decide, in which case there is no ground of discrimination of any kind between professed experts. This virtually breaks down the distinction between experts and non-experts.

It is a matter of common experience that persons wholly unqualified are admitted to testify as experts, and such witnesses often speak with an assurance rarely seen in men of profound scientific attainments; thus verifying the saying that "fools rush in where angels fear to tread." Besides this inevitable embarrassment under the present system of procedure, there are abuses which more than merely justify criticism. The unseemly spectacle is often witnessed of medical experts arrayed against each other

in a cause, and not only giving wholly contradictory testimony upon the same question, but manifesting all the partisan zeal, and frequently more bitterness of antagonism, than is exhibited by the opposing counsel. This results, in part at least, from the volunteer position of experts, which is sometimes termed the Anglo-American practice. Each party selects witnesses holding views to suit his purpose, or he retains them as he does his counsel, to take care of and advance his interests. They are generally well paid for their services, sometimes larger fees even than the counsel in the case. Thus, interest and the zeal of a paid retainer are added to professional pride and jealousy, the sure outcome being a painful, not to say disgraceful, scene in court. It is scarcely in human nature, under such circumstances, for a witness to resist the temptation of becoming a partisan, and manifesting feeling wholly unbecoming the position. It is scarcely too much to say, there is no theory of insanity however wild and absurd, and no perversion of facts and science however monstrous, that have not been subsidized in criminal jurisprudence under the guise of expert testimony. No witness, and especially no *professional* witness, should be subjected to such a strain. Applied here as wheresoever in all the relations and activities of life, there is great significance in the prayer, "*Lead us not into temptation.*" It is apparent at a glance that under the present procedure, with its attendant abuses, there will be great difficulty often in ascertaining the truth. "Who shall decide when doctors disagree?"

One remedy proposed for some of the evils incident to the Anglo-American practice is the adoption of the German system. Under this system medical experts are appointed by the state. They are selected from men scientifically trained, who have successfully passed an ex-

amination in the specialty of medical jurisprudence in the manner prescribed by law. In some of the German states, for every county there is appointed a governmental physician and surgeon, who is charged with the duty of examining and reporting upon cases requiring medico-legal investigation. If they differ in opinion, an appeal may be taken to a medical college appointed for the province, composed of men of peculiar experience, and knowledge in medical jurisprudence. Then there is an appellate court established for the entire state. "Thus in Prussia," says a German authority, "we have (1) the county physician and the county surgeon; (2) the medical college of the province, consisting of the chief-president, a pharmaceutical assessor, and a physician whose specialty is the diseases of animals; and (3) an appellate medical commission for the whole monarchy."

Such a system as this eliminates from medico-legal investigations all interested testimony, and gives to the court and jury the unbiased judgment of thoroughly competent alienists, instead of the conflicting and perplexing jargon of feed experts, or the audacious utterances of brazen empirics.

Under our government and constitutional provisions there might be some difficulties in the way of adopting such a system, in its completeness, not encountered in the German states. But were governmental expert commissions established, the courts might at least refuse to put an alleged insane criminal on trial for the offense charged until advised by such commission of his legal responsibility, and should the prisoner, after being declared responsible by the commission, insist upon the plea of insanity for his defense, the opinion of one of the commissioners would outweigh the testimony of a cohort of hired experts. Until some change occurs in the present

system, alienists will of necessity be called as witnesses. And if called, and required to leave their business and attend the sessions of a court for days, and perhaps for weeks, it is only simple justice that they should be fully recompensed; and they are not obnoxious to just criticism for demanding and receiving compensation. Such only as yield to the temptation of virtually selling their testimony for a price are fairly open to censure. Honorable members of the profession may do much to alleviate somewhat the worst features of the present expert system. Let them insist upon a high standard of professional honor and practice in the matter; firmly resisting all inducements to swerve a hair's breadth from the line of rectitude, or the dictates of judgment and conscience, for the benefit of either party, and frown indignantly upon the mercenaries in their ranks, who, by yielding to the lust of gain, degrade their high calling. The court and legal profession may also do much to correct this evil. To them it is well known and peculiarly obnoxious; and there is no class of men who are quicker to see and condemn, and more prompt to remedy, any practice which obstructs the due and pure administration of justice than the much-abused lawyers.

It is exceedingly desirable that the courts throughout the Union should harmonize upon the question, What constitutes legal insanity? It is also important that they should adopt a uniform rule in respect of the burden of proof. Such agreement would relieve trials of much confusion and embarrassment, and tend to certainty and uniformity in the administration of criminal law. It could not then well be, as now, that a criminal tried in New Jersey, and sent to the gallows, would, if tried in Indiana for the same offense, on the same evidence, be acquitted. But what is needed most of all, perhaps, is a

sound and wholesome public opinion on the subject; an opinion that shall embody itself in legislative enactments, sustain courts in the administration of penal law, and furnish spinal qualifications to juries.

There is a morbid, ill-directed sympathy, a tender sentimentality, abroad in the land, which expends itself upon the assassin while overlooking the desolate home and broken-hearted friends of his victim. Weak men and silly women seek the murderer's cell, and strew it with flowers with as much fervor of sentiment as the religious devotee who visits the shrine of his idolatry. The tendency of this sickly sentimentality is to disarm justice and break down the safeguards of society. It often pervades the jury box, and sometimes finds a responsive chord in the breast of the judge. One most deplorable effect is the stimulus given to lynch law. On the occurrence of some peculiarly atrocious crime, the popular indignation is aroused, and bold, impulsive men, lacking confidence in the ordinary methods of justice, take the law into their own hands, and inflict swift vengeance! Such acts of unlawful violence are severely and justly condemned, yet it cannot be denied that they are often prompted by that deep-seated abhorrence of murder, and innate sense of guilt, that drew from Cain the cry of terror,—“Every one that findeth me shall slay me.”

The remedy must be sought in a uniform, well-adjusted system of criminal jurisprudence, which administered by magistrates and juries possessing intelligence, and the combined attributes of justice and mercy, and sustained by a sound and vigorous public opinion, will protect the innocent, and mete out just and sure punishment to the guilty.

CHAPTER XX.

LITERARY PROPERTY AND INTERNATIONAL COPYRIGHT.

By Horace E. Smith, LL. D.

(Read before the Albany Institute, March 18, 1883.)

What is the meaning of the term *property*? In its primary and legal sense it signifies *ownership*; but it is used to express both the *ownership* of a thing, and the *thing* owned: to signify the *right* and *interest* which a person has in any subject of property and also what things constitute *the subjects* of property. In its conventional use it is not restricted to corporeal things, and in legal terminology it embraces all subjects of property, whether corporeal or incorporeal.

In the sense of ownership, property is variously defined: "the exclusive right of possessing, enjoying and disposing of a thing," "exclusive dominion over a thing, and the right and interest which a man has in lands and chattels to the exclusion of others." Either of these definitions is sufficiently accurate for ordinary purposes, but the one best suited to this discussion is that of exclusive dominion over a thing.

But whence the idea of property? What is the origin of the right of property? These and cognate questions have elicited much learned discussion and developed divers theories. A review of this discussion is unnecessary for our present purpose, but it may safely be premised that the idea of property was implanted in the human consciousness by the Author of our Being. This, doubtless, is the genesis of the idea and the true origin of the right of property.

Says Ahrens, a distinguished German writer: "For

every man property is a condition of his existence and development. It is based on the actual nature of man, and should, therefore, be regarded as an original, absolute right, which is not the result of any outward act, such as occupation, labor, contract. The right springing directly from human nature, the title of being a man, is sufficient to confer a right of property." In every age, and among all nations and peoples, from the rudest and most barbarous to the highly civilized and polished, there has existed a natural sense of property, an intuitive conviction of a natural right to acquire, possess and enjoy external things. But how is this primal idea, this abstract right, to be *actualized*? How does an individual acquire *exclusive* title to and dominion over a particular thing? It is mainly to this question that attention has been directed by writers on natural law. Chancellor Kent wrote: "The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself." Grotius and Puffendorf base the right on social compact, holding that there must have been a previous implied assent that the first occupant should become the owner. But Locke, Blackstone, Barbeyrac and others insist that such implied assent or tacit agreement is not essential; that the right is created by the act of occupancy, or that it is the fruit of labor. This may be regarded as the prevailing and correct view.

The full recognition of this exclusive right, both as it respects the use and the substance of things, was the result of growth and development. Referring to the germinant period of legal ideas, we find that he who first began to *use* a thing acquired a property therein by common consent; but this property was understood to continue so long as the exclusive use or occupancy continued, and no longer.

This rule was well adapted to both the *capacity* and *wants* of man in a rude and undeveloped condition of the race. His nature was largely sensuous; he lived mainly in the *outward* and the *material*; he could not grasp abstract ideas. Hence the truth of the saying that "property without *possession* was too abstract an idea for savage life." And hence, also, the fact that mere occupancy or use of external things was ample for the few and simple wants of man in the childhood of the race. But when the population of the earth and the wants of man increased, when social relations grew more complex, and the interests of individuals began to clash, the necessity of a more complete title to and dominion over subjects of property became apparent. It was seen that the possessory owner ought to have a right, not to the immediate use only, but to the very *substance* of the thing used. This advance idea was a corollary from the primary, natural sense of property, as well as a social necessity; but the perception and recognition of the idea was principally due to necessity.

Next in the natural and logical order of development came the right of transferring both the use and substance of a thing from one person to another. Ownership of the substance carried with it the right of transfer.

Finally, the fabric of property rights was completed and crowned by the doctrine that no man can be deprived of his property, except by authority of law, without his consent. Thus, gradually advancing slowly, step by step, as the exigencies of society demanded, and enlightened reason dictated, grew up the enlightened and just system of rules and principles which now constitutes the law of property. First, the intuitive idea of the right of property, the natural right of a man to exercise dominion over external things; second, the exclusive right of the indi-

vidual to the *use* of a thing or subject of property while in possession; third, exclusive right not only to the *use*, but the *substance* of the thing; fourth, the right of transferring both the use and substance from one person to another; and fifth, the doctrine that a man cannot be deprived of his property, except by authority of law, without his consent. Thus much has been said, and perhaps more than was necessary, to clear the way for an intelligent discussion of *literary property*.

And what is *literary property*? No better definition can be formulated than that furnished by Mr. Drone in his excellent treatise on copyright: "Literary property," he says, "is the exclusive right of the owner to possess, use and dispose of intellectual productions. An intellectual creation without material form may exist in the mind of the author, but it is only when embodied in written or spoken language that it can possess the attributes of property; for it is only by language that it can have any being out of the author's mind, that it can be enjoyed by others, that it can be identified. There can, then, be no property in a production of the mind unless it is expressed in a definite order of words. But the property is not in the mere words alone, not alone in the form of expression chosen by the author. It is in the *intellectual creation*, which language is merely a means of expressing and communicating. As the term *copyright* is often used synonymously with *literary property*, and indifferently to signify both the common-law and the *statutory* right of the author in a literary composition, it should be noted that there is a difference, an essential difference, between the two rights. The *common-law* right is the right or property of an author in his brain work before publication, and may appropriately be termed *common-law copyright*, it being a natural right

wholly independent of statute, which is recognized and protected by the common law. The *statutory right* is the right of an author in his literary work after publication, and may properly be characterized as *statutory* copyright. It is the exclusive right of the owner to multiply and to dispose of copies of an intellectual production — a right secured by statute.

The next question in the logical order of discussion is, Has the author a natural proprietary right in the products of his brain? In other words, is there such a property right as *common-law copyright*? Varying the question still, has the literary creator a natural right to, and property in, his creatures? Such creations, it is positively affirmed, have all the attributes of property. Adopt the theory that exclusive property originates in labor, and who of all earth's toiling millions has a clearer or better title to the products of his labor than the author? True, his labor is primarily and mainly *intellectual*, but it is often severe, protracted and exhausting. No kind of labor is more relentless in its demands, or more consuming to the vital energies. If the origin of exclusive property in a thing be referred to preoccupation, the title of the author to his intellectual creations is equally clear, for he, certainly, first has possession of them.

Sir William Blackstone, speaking from the bench, said: "A literary composition as it lies in the author's mind, before it is substantiated by reducing it into writing, has the essential requisites to make it the subject of property. While it thus lies dormant in the mind it is absolutely in the power of the proprietor. He alone is entitled to the profits of communicating, or making it public. But, strange though it may seem, jurists, publicists and statesmen are sometimes met who repudiate *in toto* the idea of

property in literary productions as a natural or common-law right. Their line of reasoning is substantially this: First. *Material substance* is an attribute of property, and nothing can be the subject of ownership which is not corporeal. Second. That identity is necessary to exclusive ownership; and third, that materiality is essential to identity. That identity is necessary to exclusive ownership is quite true; but that *materiality* is essential to identity is not true. It is simply a bald assumption; and therein lurks the vice of the reasoning. In the celebrated case of *Millar against Taylor*, decided by the court of king's bench in 1769—the subject of which was a piratical issue of an edition of Thompson's Seasons,—Mr. Justice Yates took ground against literary property, and defended his position with much spirit and considerable plausibility. He said, among other things: "But the property here claimed is all ideal; a set of ideas which have no bounds or marks whatever; nothing that is capable of visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other mode of acquisition or enjoyment than by mental possession or apprehension; safe and invulnerable from their own immateriality; no trespass can reach them, no torts affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself; and these are what the defendant is charged with having robbed the plaintiff of."

Lord Mansfield and Justices Aston and Wiles maintained the right with a strength of argumentation and a wealth of learning rarely equaled in forensic discussion; and the judgment of the court was in accordance with their views. The *opinion* alone of Lord Mansfield, unsupported by his cogent reasoning, is entitled to great

consideration. He was, in the language of Lord Thurlow, a surprising man; ninety-nine times out of a hundred he was right in his decisions and opinions; and when once in a hundred times he was wrong, ninety-nine men out of a hundred would not discover it. Mr. Justice Thompson, of the Supreme Court of the United States, speaking from the bench of Justice Yates' view, said that "it would hardly deserve a serious notice had it not been taken by a distinguished judge."

It seems hardly credible that a distinguished judge should have taken the ground, in a solemn judicial utterance, that *corporiety* is essential to property. The merest tyro in law knows that there is a kind of property, quite extensive in range, which is *wholly incorporeal* in its nature; and yet it is distinctly recognized, well defined and fully protected as *property* in every enlightened system of jurisprudence in the world.

Subjects of this class of property are denominated "*choses in action*," and sometimes rights in action, and they are defined by approved law-writers as "*personal property of an incorporeal nature*." Speaking of this kind of property, Chancellor Kent says: "By far the greatest part of the questions arising from the intercourse of social life, or which are litigated in the courts of justice, are to be referred to this head of personal rights in action."

Literary property, it should be remembered, consists in the intellectual creation; it may be embodied in characters which express and convey to others the author's thought and "imprisoned upon the printed page;" but this embodiment is not the essence of the author's property, but only the vehicle which conveys it. This incorporeal property may exist as perfectly when expressed in *spoken* as in written language. A poem recited, a lecture delivered *memoriter*, a song vocalized, an acted

drama, may have the attributes of property, without a written or printed word. Says Mr. Drone: "That greatest creation of ancient genius, the Iliad, has not only preserved its identity through nearly thirty centuries, but, according to Jacobs and other Greek scholars, it was recited from memory at the Greek festivals for ages before it was "imprisoned in written characters." This fact alone refutes the objection that an intellectual creation is incapable of identification, and hence lacks an essential requisite. It is idle to affirm that the literary productions of genius cannot be distinguished from each other by persons versed in *belles-lettres*. It is a well-known fact that the individuality of a literary composition may be so marked, its identity so complete and enduring, that it will live intact in the memory for ages, and, without writing or print, pass from one generation to another, and, borne upon the wings of fame, encircle the earth.

When viewed in the light of reason, nothing can be more absurd than the doctrine that a man cannot have property in the product of his brain-work. Scarcely more unreasonable is Proudhon's motto that "Property is robbery." With a very small investment of time, labor and skill, a man may grow a cabbage to feed his perishable body, and it becomes his property, sacred as such in the eye of the law, and to the protection of which the whole power of government is pledged. But, according to Mr. Justice Yates and his disciples, if a man of transcendent genius creates a grand poem, which ministers to the immortal mind, and becomes itself immortal, he has no rights in it which the public are bound to respect. It is an outlaw from birth, and falls a prey to the vandalism of mercenary pirates and literary ghouls.

In the view of such law and logic, Homer's Iliad,

Dante's *Inferno*, Milton's *Paradise Lost*, or Shakespeare's *Hamlet*, is nothing in comparison with a cabbage. With a small piece of basswood, a twenty-five-cent jackknife, and an hour's whittling, a boor may manufacture a rude wooden porridge-spoon which is immediately clothed with the attributes of property and becomes his by the force of a natural law. But let a man of extraordinary ability, by years of toil, and by the expenditure of a large amount of money, produce a literary work which shall contribute much to the sum of human knowledge, and greatly benefit the race, and it is at the mercy of a selfish world, or the caprice of an unappreciative legislature, such is the logic and such the fruit of the doctrine of no property in brain work.

As a pertinent commentary on the doctrine, and a fair illustration of its injustice, may be mentioned the experience of Sir Archibald Alison in the preparation of the *History of Europe*. In a petition to parliament for protection he says among other things: "That with a view to the collection of materials and the acquisition of local information requisite for a work of such magnitude, it was unavoidably necessary for your petitioner to visit in person the principal countries in Europe, and purchase the works in all languages bearing upon so extensive a subject. That during the last twenty-five years your petitioner has, with this view, six times repaired to the continent and repeatedly visited the principal parts of France, Italy, Switzerland and Germany; that the cost of these journeys has already exceeded one thousand five hundred pounds, and the expense of the books necessary for the compilation of the undertaking has amounted to more than two thousand pounds. If your petitioner lives to complete his undertaking, his total expenditure on account of it will be about four thousand pounds."

Yet, according to the doctrine now under treatment, Sir Archibald Alison, after twenty-five years of hard labor, during the best portion of his life, and an expenditure of \$20,000 to produce a great historic work, acquired no property in it and was entitled to no protection at the common law. Inasmuch as a common-law property in *unpublished* works is generally recognized, and protection for a limited period *after* publication is accorded by statute, it may seem unnecessary to discuss the abstract question of literary property. Such discussion, however, will serve to characterize some extraordinary features in the judicial history of literary property and point to a just and rational solution of important questions involved in the subject.

The distinction between *common-law* right and *statutory* right has already been noticed. The former is a right existing in literary productions before publication, which possess the same attribute of perpetuity as any other species of personal property; and it is thus recognized and protected by the courts, both in England and the United States. The latter exists only in works which *have been published* within the meaning and according to the provisions of the copyright law. The statutory right is limited to a term of years; in England, forty-two years, or during the life of the author and seven years after his death, in case this should be a longer period; in the United States, to the term of twenty-eight years, with the privilege to the author, if living at the expiration of the term, or to his widow or children if he be dead, of having the right continued for the further period of fourteen years.

The most extraordinary feature in the whole matter is that, as the law is held, the two rights cannot co-exist in the same work; when the statutory right begins, the common-law ends, and ends forever. When a composi-

tion is published in print, the common-law right of the author is lost; and if the publication do not conform to the provisions of the statute, he secures no statutory right and is left without protection. A brief review of the history, the judicial history, of literary property will aid the discussion; but such review must necessarily be very general under our limitations of time.

The first distinctive copyright statute enacted in England was what is known as the "statute of Anne," passed in 1700. There is clear evidence that property in literary productions had thereby been recognized by the English courts for a period of at least fifty years; and a strong probability that such recognition extended back to the latter part of the fifteenth century, when printing was introduced into England. The ante-statutory existence of this right must, of course, have been due to the common law.

The statute of Anne was enacted on the petition of proprietors of copies praying for more effectual protection for their property, and a more adequate remedy for infringement of their rights than was afforded by the common law. They asked, among other things, that confiscation of the counterfeit copies might be made one of the penalties. Their prayer for relief assumed the existence of a common-law right; and they never once dreamed that the answer to their prayer would deprive them of that right. Between the passage of this act in 1710, and the decision of *Millar v. Taylor*, there were not less than five solemn adjudications, by the English court of chancery, sustaining the common-law right, notwithstanding the statute of Anne. These causes were decided by such jurists as Sir Thomas Jekyl, Lord Talbot and Lord Hardwicke.

Then came the cause of *Millar against Taylor*, in which,

after elaborate argument and full consideration, it was adjudged by the court of king's bench, against the opinion of Mr. Justice Yates, that copyright had its foundation in the common law, and was not destroyed by the statute of Anne, which was enacted for its more complete protection. Five years later the same question came before the House of Lords on appeal, in the case of *Donaldson v. Becket*. The lords, as they might do, ordered the opinion of the twelve judges upon the questions of law involved. Ten of them answered that at common law the author of an unpublished literary composition had the right of publishing it for sale, and might maintain an action against any person who should publish it without his consent. From this view one judge dissented. Eight maintained that at common law the author's exclusive rights were not prejudiced by publication, while three were of opinion that publication was an abandonment of the common-law property. Seven maintained that the ownership of literary property was perpetual by the common law. Five were of opinion that the statute of Anne did not destroy, abridge, or in any way prejudice the common-law property in a published work, and did not deprive the author of his common-law remedies. Six made answer that the common-law right was taken away, immediately after publication, by statute, to which alone the author must look for protection. Lord Mansfield, being a peer, refrained, from motives of delicacy, from giving an opinion, but it was well known that he adhered to the opinion which he so ably maintained while sitting as chief justice of the king's bench. The twelve judges were, in fact, evenly divided upon the important question whether the statute of Anne had abridged the author's common-law right, or left it perpetual like other proprietary natural

rights. Thereupon Lord Camden, moving the judgment of the house, made a most extraordinary harangue against the doctrine of literary property. His attack was vigorous, almost ferocious and specious, but—it must be said—marvelously sophistical. And, strange phenomenon, chief among his supporters with speech and vote was Lord Macaulay. The decision of the court was reversed, and the doctrine established that the common-law right was taken away, after publication, by the statute. So the law remains in England to this day.

It has been suggested as an explanation of Lord Camden's course on this occasion that he was influenced by a rivalry between himself and Lord Mansfield, and color of truth is given to this explanation by the language of Lord Campbell in his "Lives of the Chancellors." It is represented by him that for a long time "these great men had contended for the supremacy as law lords of the upper house," and that in one scene, which occurred about four years before the discussion of the question of literary property, they had a personal controversy of a very disagreeable character, in which Lord Camden seems to have triumphed by the exhibition of more nerve than belonged to the "silver-tongued Murray." Mr. Justice Yates, while at the bar, had been engaged in the first controversy which arose under the statute of Anne, and contended that copyright was a monopoly. It is just possible that this circumstance may have influenced, to some extent, his judicial opinion; it does not often happen that the prejudices of the barrister are put aside with his gown when he dons the ermine. It is not strange that the judgment of the House of Lords caused surprise and alarm when known among men of letters, and especially among booksellers, who had large investments in copyrights, which they had understood to be perpetual, but

which were now outlawed. They had asked for a fish, and, in the judgment of the House of Lords, parliament had given them a scorpion.

In this exigency an appeal was again made to parliament for relief, which met favor from the House of Commons, but failed of success through the hostility of the House of Lords. Efforts to secure favorable action by parliament were renewed from time to time, till 1842, when they resulted in the present law, which is more liberal in its provisions than any prior statute. The last movement which thus resulted was led in the House of Commons, with consummate ability, by Sargeant Talford, whose efforts were aided by petitions from some of the most distinguished British authors, including Sir Walter Scott, Professor Wilson, Archibald Alison, Sir David Brewster, Thomas Carlyle, Thomas Campbell, Charles Dickens, Robert Browning, Douglas Jerrold, Leigh Hunt, Mary Russell Mitford and Thomas Hood.

A petition of Mr. Hood, not actually presented to parliament, is so full of mingled truth, wisdom and wit that the temptation to quote a few passages from it in this connection is irresistible. It runs thus:

"The humble petition of the undersigned Thomas Hood sheweth: That your petitioner is the proprietor of certain copyrights which the law treats as copyhold, but which, in justice and equity, should be his freeholds. He cannot conceive how Hood's Own, without a change in the title deeds, as well as the title, can come to be Everybody's Own hereafter." . . .

"That cheap bread is as desirable and necessary as cheap books; but it hath not yet been thought necessary or just or expedient to ordain that, after a certain number of crops, all cornfields shall become public property." . . .

"That when your petitioner shall be dead and buried, he might, with as much propriety and decency, have his body snatched as his literary remains."

"That your petitioner hath two children who look up to him not only as the author of the Comic Annual, but as the author of their being. That the effect of the law as regards an author is virtually to disinherit his next of kin and cut him off with a book instead of a shilling."

"That your petitioner is very willing to write for posterity at the lowest terms, and would not object to the long credit, but that when his heir shall apply for payment to posterity he will be referred back to antiquity."

"That as a man's hairs belong to his head, so his head should belong to his heirs; whereas, on the contrary, your petitioner hath ascertained by a nice calculation that one of his principal copyrights will expire on the same day that his only son should come of age. The very law of nature protests against an unnatural law which compels an author to write for anybody's posterity except his own."

The judicial history of literary property in the United States may be given in few words. Prior to the adoption of the federal constitution, which was framed in 1787, copyright laws were passed in several of the states, and most, if not all, of these laws recognized the common-law right. In order to secure adequate and uniform protection throughout the United States to literary property, inventions and discoveries, a provision was inserted in the federal constitution empowering congress "to promote the progress of science and the useful arts, by securing to authors and inventors for limited times, the exclusive right to their respective writings and discoveries."

Under this power congress has from time to time enacted copyright laws. The first, passed in 1790, was sub-

stantially a copy of the English existing statute, the one used by the House of Lords for the destruction of common-law copyright. In 1834 this act came before the Supreme Court of the United States for construction, in the case of *Wheaton against Peters*, reported in 8 Pet. 591, which presented substantially the same questions adjudicated in *Donaldson v. Becket*, and our court in its judgment followed the English precedent. The judges, however, were divided in their opinion. Mr. Justice McLean delivered the opinion of the court, three of his associates agreeing, two dissenting, and one being absent. The dissenting opinions of Justices Thompson and Baldwin are regarded as masterly expositions of the true principles underlying and governing literary property. If the views now indicated are sound, it follows inevitably that the common-law right in brain-work has been unjustly stricken down by judicial construction.

The will and caprice of the legislature has been substituted for a God-given right. Under the adjudications in England and the United States, if the legislature, not sympathizing "with them literary fellers," should refuse all protection, property in literary productions would cease with publication in print. Even under the most liberal copyright statutes, the author's right is abridged; for if it be a common-law right, it is as much entitled to recognition and protection as any other species of property. But the true and righteous rule will not prevail until an enlightened and thoroughly aroused public sentiment shall have compelled just legislation, or a second Mansfield shall have come to judgment and broken the shackles of precedent. In the meantime, and under the circumstances, authors must seek all available remedies, and this leads to the consideration of *international copyright*.

Our government, it must be confessed, does not occupy an enviable position either in respect of its own copyright legislation or in its attitude towards international copyright. Our copyright laws are more illiberal than the English towards aliens, and this country has never cordially responded to England in her effort to secure international copyright. As early as 1838 an act was passed by the British parliament, enabling the author of a book first published in a foreign country to obtain copyright in England, on condition that a like privilege should be extended by such country to English authors. A similar act on the part of the United States would have settled the question on just and liberal principles. But such reciprocity would not advance the real or fancied interests of American publishers and their influence was potent to prevent it.

England has always manifested a willingness, nay, a desire, to make with the United States, as with other nations, some just and liberal arrangement upon the subject either by legislation or treaty. She has established international conventions with Russia, Saxony, Brunswick, Thuringian, Hanover, Oldenburg, France, Anhalt, Hamburg, Belgium, Spain and Sardinia. But hitherto all efforts to effect an arrangement with the United States have failed.

In 1837 the subject came before the Senate of the United States, on a petition of British authors presented by Henry Clay. The subject was referred to a select committee consisting of Messrs. Clay, Preston, Buchanan, Webster, and Ewing, of Ohio. A report from this committee, framed presumably by Mr. Clay, soon followed, urging the passage of a law which should secure to foreign authors their copyright in this country. The report contains this language: "That authors and inventors have,

according to the practice of civilized nations, a property in the respective productions of their genius, is incontestable; and that this property should be protected as effectually as any other property is by law, follows as a legitimate consequence. Authors and inventors are about the greatest benefactors of mankind. They are often dependent exclusively upon their own mental labors for means of subsistence, and are frequently, from the nature of their pursuits, or the constitution of their minds, incapable of applying that provident care to worldly affairs which other classes of society are in the habit of bestowing. These considerations give additional strength to their just title to the protection of the law. It being established that literary property is entitled to legal protection, it results that this protection ought to be afforded wherever the property is situated. A British merchant brings or transmits to the United States a bale of merchandise, and the moment it comes within the jurisdiction of our laws they throw around it effectual security. But if the work of a British author is brought to the United States, it may be appropriated here and republished without any consideration whatever being made to the author. We should be all shocked if the law tolerated the least invasion of the rights of property in the case of the merchandise, whilst those that justly belong to the works of authors are exposed to daily violation without the possibility of their invoking the law." The direct and immediate effect of the delinquency of our government in the matter is, not only to deny justice to foreign authors, but to deprive American authors of all protection for their works beyond the limits of their own country. It is said upon reliable authority that according to the statistics of 1878, ten per cent. of the works issued in England were American reprints.

There are also incidental evils of a serious nature resulting from the want of an international copyright law. Under the present *status* there is very little encouragement for young and unknown American authors. Publishers find it much easier to steal and reprint works of popular foreign authors than to pay this class of American authors even a moderate compensation. Mr. Charles Reade says that he is informed by certain American authors that the rejected manuscript often bears marks of the copying machine, and the subject matter is, in due course, piratically used. In his nervous style he draws a graphic picture of the young victimized author, which, unfortunately, wears too many lineaments of truth. He says: "It becomes the old to feel for the young; let me trace that poor young author's heart. He is young, and the young are sanguine; he is young, and the young are slow to suspect cold-blooded villainy and greed in men that are rich and who need not cheat to live and live in luxury. He takes his manuscript in good faith to a respectable man. He is told that it shall be read. There are delays. The poor young man, or young woman, is hot and cold by turns; but does not like to show too much impatience. However, in time he begins to fear that he is befooled. He calls and will have an answer one way or other. Then a further short delay is required to reperuse or to consider. That delay is really wanted to copy the manuscript. The manuscript is returned with a compliment; but the author is told that he is not yet quite ripe for publication; he is paternally advised to study certain models (British), and is encouraged to bring another manuscript improved by these counsels. *Ods Nestor!* It reads like criticism and paternal advice. The novice yields his own judgment, sighs many times if he is a male, if female has a gentle cry that the swine, earth is

tenanted by, are not asked to pity or even to comprehend; and the confiding American youth, thinking gray hairs and grave advice must be trustworthy, sets at work to discover the practical merit that must lie somewhere or other at the bottom of British mediocrity and "decent debility;" he never suspects that the sole charm of these mediocre novels lies not in the British platitudes and rigmarole, but in the Latin word *gratis*. While thus employed he sees, one fine day, some sketches of life in California, Colorado, or what not, every fact and idea of which has been stolen from his rejected MS., and diverted from its form and reworded and printed; while he, the native of a mighty continent, has been sent away for mundane instruction to the inhabitants of a peninsula on the north coast of France.

The late Mr. Emerson, in his calmer style, wrote thus: "There are men in this country who can put their thoughts in brass, in iron, in stone, or in wood; who can build the best ships for freight, and the swiftest for ocean race. Another makes revolvers and another a power press. But scarcely one of our authors has thrown off British swaddling clothes. The great secret of the world-wide success of *Uncle Tom's Cabin* was its novelty; it had something peculiarly American in it. The works of American authors have been smothered under English authors in the American market. Not only has the wholesale system of malappropriation most injuriously affected the interests of living American authors, but it has a tendency to dwarf down the original literature of the United States to a servile copyism, and to check the development of the national mind."

It should be stated, in justice to some of our leading publishers, that they deny the charge of piracy, and assert that they have been in the habit of paying for

eign authors for reprints. It appears, from letters addressed to them by "The Critic," in 1882, that the Appletons had paid a ten per cent. royalty on the retail price to Herbert Spencer, Darwin, Huxley, Tyndall, Lubbock, and others, and that J. B. Lippincott & Co. paid Ouida £300 for each of her novels, and as much more for some of George McDonald's books; that Dodd, Mead & Co. paid Mrs. Charles, the author of *The Schonberg Cotta Family*, thousands of dollars for her earlier works, and had continued to pay for her later and less popular writings; and that other publishers had paid more or less for reprints. But these defensive allegations omit two important facts which materially affect the case: First, they do not state that these payments were voluntary, not made in response to any legal obligation which the author could enforce; indeed, the helpless author had no voice in the amount paid, and only enjoyed the poor privilege of withholding his sanction to an "authorized American edition" at the hazard of losing all by sheer robbery. Secondly, the payments thus gazetted as a vindication of our publishers were made upon condition of receiving the author's assent to the issue of an "authorized American edition," which practically gave them the exclusive right of reprinting in this country under the protection from competition afforded by what is known as the "courtesy of the trade," which is near of kin to the moral and high-toned rule of "honor among thieves." That the privilege of publishing an "authorized American edition" with the author's sanction was at one period of considerable value to the publisher under the courtesy-of-the-trade-rule may be inferred from the fact that Wiley's Sons offered Mr. Ruskin \$5,000 for the privilege of publishing such an edition of his works. It is not, therefore, entirely clear to ordinary perception that the

payments in question were entirely disinterested. But this class of publishers have found that the "courtesy of the trade" does not always protect them in their reprints against the rapacity of unscrupulous parties. For example, Messrs. Roberts Brothers of Boston in 1880 issued a circular in reference to unauthorized and cheap reprints of Jean Ingelow's poems. It seems that seventeen years before they had published the first American reprint of her poems, paying her, as they alleged, as though she had been an American author legally entitled to it. For a long time no other publisher interfered with their monopoly. They had made large expenditures by advertising and otherwise, and had paid Miss Ingelow the aggregate of \$18,000. At length a pirate seized upon the unprotected property, and, issuing a cheap reprint, compelled Messrs. Roberts Brothers to sell their superior edition at a greatly reduced price, thus inflicting a severe blow upon both publisher and author. In this particular case the pirate was an Englishman, who, it seems, had been stimulated by the success of American enterprise in this field of labor.

Until within a very recent period ¹ American publishers had opposed international copyright, and for no other reason within the bounds of knowledge or reasonable conjecture than the damaging effect such an arrangement might have upon the morally contraband traffic in the poor author's brain work. But experiences like that of Messrs. Roberts Brothers in the case named so affected some of our leading publishers as to produce in them a change of heart. Finding that the prestige of their authorized American editions was destroyed, and their enormous profits greatly reduced by the action of parties who cared

¹ Recent legislation has modified the subject of International Copyright, and the laws are much improved.

as little for the "courtesy of the trade" as they did for the rights of authors, these publishers came to the front and magnanimously asked for an international arrangement. But the work of sanctification was not yet perfect. They were not willing to accept the fair and honest scheme proposed by England, which was in effect that English copyright be recognized and protected in the United States, and American copyright in Great Britain, so that a work published in either country shall be protected in the other without reprinting, which doubles the original cost of manufacture and thus imposes an extra burden upon the reader. On the contrary they insist that, to entitle an English book to protection in this country, it must be reprinted or manufactured here by a subject or citizen of the United States. What they ask is, not protection to American authors, but monopoly and protection to American publishers. In the language of Mr. William Appleton, in a letter to the London Times, they claim that the arrangement offered by England is but "a legal saddle for the English publisher to ride his author into the American market." It cannot be denied that their treatment of this question gives some color of truth to the epigram that "publishers drink their wine out of authors' skulls."

There are other interesting and important phases of the subject which must be wholly omitted from the present discussion, the proper limits of this paper having already been exceeded. The only plausible thing that has been said in justification or palliation of our national attitude in this matter is that it furnishes the people with an abundance of cheap literature. There is room for grave doubt whether the great volume of cheap literature which floods the land is, in truth, a blessing to the people. Nor is it by any means certain that inter-

national copyright would seriously diminish the supply of reasonably cheap editions of works that are worthy of publication. Different classes of readers would require works suited to taste and publishing ability; and the interest of publishers may, it is believed, be safely trusted to adjust the supply to the demand. But, whatever the truth may be in these particulars, no claim of American publishers for protection or demand of the public for cheap literature, however plausible or urgent, and no question of expediency which conflicts with right and justice, is entitled to a moment's favorable consideration. "Justice," it has been well said, "is the highest expediency."

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